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TRANSPARENCY IN THE PUBLIC SECTOR: THE UNITED STATES EXPERIENCE

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ABSTRACT

The purpose of this Ph.D. dissertation is to analyze the United States model of transparency in the public sector. The dissertation moves from the assumption that this model does not coincide with the Freedom of Information Act (FOIA), which is only a component – albeit prominent – of it. Government secrecy, which extends beyond the executive branch, constitutes a comprehensive limit to transparency. At the heart of the concept of government secrecy is the system of classification of national security information, which has implications for each of the three branches of the Federal Government, as the Author shows. Despite several connections with executive branch secrecy, which may be pinpointed at a theoretical level, the relation between transparency and secrecy features its own framework in the legislative and judicial branches. How this relation emerges in the executive branch, however, is the core of the issue, and its study requires distinguishing executive privilege from mandatory disclosure that federal agencies have to ensure under the FOIA. The former is mostly meant in the United States as the power of the President, implicitly recognized by the Constitution, to withhold information from Congress. The exercise of this power affects the carrying out of the congressional oversight function. As to the latter, the FOIA exemptions mold the level of agency disclosure, and the President and the Attorney General establish the extent of disclosure by issuing memoranda on implementation of the FOIA. The Author dwells on exemptions 1 and 5, as their scope embraces most of the issues addressed in the present dissertation. The federal legislation on agency open meetings, which provides for specific exemptions, complete the system of executive branch transparency. In the conclusions, the Author identifies some paradoxes in the United States model of transparency considered as a whole, which, however, turns out to be satisfactory.

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INTRODUCTION

The purpose of my Ph.D. dissertation is to analyze the United States model of transparency in the public sector. Even though this dissertation also aspires to arouse interest within the American academic community, it is mainly targeted at a European audience, as it is based on the assumption that European scholars seldom engage in a close examination of the U.S. model of transparency. Recent debate over the adoption of freedom of information (FOI) legislation in Italy has provided me with the chance to conduct such an examination. The present work, in particular, intends to answer to two related questions. The first one is the following: Does studying the Freedom of Information Act (FOIA) suffice to grasp the U.S. model of transparency existing at federal level? Since the answer is no, a second question ensues: What is there beyond FOIA provisions? The FOIA, indeed, is just a piece – albeit extremely important – of a bigger system concerning the relation between transparency and secrecy in the executive branch. Another important piece of this system is executive privilege, an institution that, despite being autonomous, is related to the scope of the FOIA, as I will show. To make the analysis more complete, I will also outline how such a relation emerges in the other two branches of the Federal Government, the legislative and judicial branches, as they contribute to forming the U.S. public sector in a broad sense. The heart of the issue of transparency, however, consists in pinpointing the level of disclosure federal departments and agencies have to ensure pursuant to the FOIA. The other federal sunshine laws, indeed, have a somewhat marginal role.

As Hood has observed, both at national and at international level, the term "transparency" has gradually gained "quasi-religious significance in debate over governance and institutional design,"[1] as well as – I add – with respect to administrative activity, in a more specific sense. This term is of Latin origin. Arena has noted that it is a compound word, which puts together two Latin terms – "*trans*" and "*apparent*" – and literally means "that which is seen-through […]."[2] The Author has argued that from its etymology, it can be

[1] CHRISTOPHER HOOD, *Transparency in Historical Perspective*, in ID. – DAVID HEALD, *Transparency: The Key to Better Governance?*, 3 (Oxford University Press, Oxford and New York, 2006).

[2] GREGORIO ARENA, *Administrative Transparency and Law Reform in Italy*, in ALESSANDRO PIZZORUSSO (ed.), *Italian Studies in Law. A Review of Legal Problems*, 111 note 12 (Martinus

inferred that the concept of transparency implies "the existence of a barrier, a body through which, however, one can look."[3] Therefore, whatever the context to which this concept applies and thus even if the context pertains to access to administrative documents and records – Arena continues – there are always "two possible positions" wherein a person may stand with respect to transparency, "one before and one beyond the barrier (though transparent)."[4] When applied to the public sector, the term "transparency" implies the concept of public scrutiny[5]. Hood has pointed out that the very public sector is the context in which the concept of transparency is most commonly used. Transparency, indeed, is often meant as a concept that "denotes government according to fixed and published rules, on the basis of information and procedures that are accessible to the public […]."[6] Heald has pointed out that "transparency" and "openness" are often used as synonyms[7], though in reality the former carries an added value, which extends beyond the mere ability to gain access to information held by public administrations. In Italy, for instance, where the concept of openness is usually conceived of as the principle of publicity, scholars have long conceded that transparency is "a *quid pluris*" with respect to both access to administrative documents and publicity[8]. As early as the late 1980s, Marrama argued that a transparent public administration is an administration capable of meeting needs "of clearness, of comprehensibility, of non-equivocality" in organizing its structure and in carrying out its administrative action[9].

Nijhoff Publishers, Dordrecht, The Netherlands, 1994). See also ROBERTO CHIEPPA, *La trasparenza come regola della pubblica amministrazione*, Dir. econ., 613, 615 (1994). Similarly to Arena, Chieppa has pointed out that transparency derives from "*trans*" and "*parere*," and means "to make appear, i.e., to let see, to let know."

[3] ARENA, *Administrative Transparency and Law Reform in Italy*, ibid.

[4] Ibid.

[5] HOOD, *Transparency in Historical Perspective*, supra note 1, at 4 (quoting JOHN BLACK (ed.), *Oxford Dictionary of Economics*, 476 (1997) (reporting the definition of "transparent policy measures" provided by the 1997 edition of the *Oxford Dictionary of Economics*, according to which policy measures are transparent when their adoption, content, and execution are "open to public scrutiny.")

[6] Id., at 5 (quoting CHRISTOPHER HOOD, *Transparency*, in PAUL B. CLARKE – JOE FOWERAKER (eds.), *Encyclopedia of Democratic Thought*, 701 (London, Routledge, 2001)).

[7] DAVID HEALD, *Varieties of Transparency*, in *Transparency: The Key to Better Governance?*, supra note 1, at 25-26.

[8] FRANCESCO MANGANARO, *Evoluzione del principio di trasparenza amministrativa*, Astrid Rassegna, 22 (2009), p. 3.

[9] ROBERTO MARRAMA, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, Dir. proc. amm., 416, 419 (1989).

As Metcalfe has noted, the term "transparency" gradually migrated to the United States from Europe especially in the early years of the twenty-first century[10]. As a result of this evolution – the Author contends – this term "now has a currency that most succinctly and comprehensively encompasses all that secrecy is not."[11] The terms traditionally used in the United States to pinpoint the concept of transparency applied to the public sector – and, namely, to the executive branch – are the following: "freedom of information;" "openness in government;" "government sunshine."[12] The phrase "access to records [held by public authorities]," instead, has always enjoyed widespread usage both in the United States and overseas. In the United States, sunlight and sunshine are the metaphors that have embodied a concept corresponding to that of transparency for more than a century. By characterizing publicity as a remedy against corruption, indeed, in the early twentieth century, Justice Brandeis stated that sunlight turns out to be "the best of disinfectants […]."[13] As Aftergood has observed, the sunlight metaphor actually represents the need for broad access to records and information held by the executive branch even when there is no fact of corruption to prevent or to fight[14]. It is interesting to point out that despite not having a long-standing tradition of the usage of the term – and concept – of transparency, the U.S. legal system features a system of FOI legislation that overall constitutes an advanced model of transparency in the public sector. The present Ph.D. dissertation is aimed at analyzing this model.

The Ph.D. dissertation is divided into three chapters, and proceeds as follows. Chapter 1 is devoted to some concepts relevant to the work. Since the dissertation is focused on the U.S. legal system, the concepts Chapter 1 takes into consideration are addressed in light of their implications for such a legal system, within which they have a specific meaning. Firstly, I will analyze the concept of secrecy, especially in the acceptation of government

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[10] See DANIEL METCALFE, *The nature of government secrecy*, 26 Gov't Inform. Quart. 305, 305 note 1 (2009).

[11] Ibid.

[12] Ibid. (referring to Dep't of Justice, *FOIA Post, "OIP Gives Implementation Advice to Other Nations"* (posted: December 12, 2002)).

[13] The entire statement of Justice Brandeis reads as follows: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, *What Publicity Can Do*, Harper's Wkly. (December 20, 1913), reprinted in ID., *Other People's Money and How the Bankers Use It*, 92 (Frederick A. Stokes Co., New York, 1914, then reprinted in 1932).

[14] See STEVEN AFTERGOOD, *Reducing Government Secrecy: Finding What Works*, Yale L. & Pol'y Rev. 399, 399 (2009).

secrecy. The Federal Government – namely, the executive branch – often withholds certain information from public access to protect some interests that are essential to the country. During an address delivered before the Association of the Bar of the City of New York in 1975, Attorney General Edward Levi pinpointed such essential interests as government secrecy is aimed at protecting: national security; foreign affairs; law enforcement. American citizens are aware of the need for secrecy, and accept that their right to know be subject to restrictions. The Moynihan Commission Report underscored that the system of classification of national security information represents the core of such secrecy. A Senate subcommittee hearing, which took place in 1973, addressed government secrecy. During the hearing, Sen. Edward M. Kennedy stressed that wrongdoing tends to thrive when secrecy prevails over transparency, as the Watergate scandal showed. However, as noted above, transparency may not be absolute. At that hearing, Attorney General Elliot L. Richardson pinpointed the underlying paradox that features government secrecy: On the one hand, such secrecy poses some risks, as it lends itself to abuses in its usage; on the other hand, it is necessary. The Constitution assigns the President of the United States both the role as Commander-in-Chief and authority in the domain of foreign affairs. Accordingly, the President – the Attorney General observed – is empowered to keep secrets when he deems that disclosure would jeopardize one of the fundamental interests of the country, and thus is empowered to establish a system of classified information pertaining to national security. Then, the distinction between deep and shallow secrets, elaborated by Scheppele in 1988, is analyzed. For purposes of the present work, such a distinction, based on the degree of predictability of a given secret, is of interest for its potential application to the public sector, which does not constitute its original scope. The national security domain is fertile ground for the creation of deep secrets. Kitrosser, however, has argued that the Constitution requires that secrets be shallow and thus susceptible to checks within the Federal Government. Seemingly, covert action falls within the concept of deep secrets, though in reality it should be considered just an example of shallow secrets, since Congress is entitled to be informed of any covert action the President of the United States decides to take on. Subsection B addresses the need to strike a balance between transparency and secrecy. Furthermore, other two values with respect to which a compromise is to be reached are democracy and efficiency. To identify the proper balance between transparency and secrecy, the risks of excessive secrecy must be taken into account, such as those related to poor sharing of information within the executive branch. Furthermore, transparency is a remedy against the so-called groupthink, i.e., the tendency of a group of people featured by a high level of cohesion to sharing the same view,

without leaving any room for oversight over possible mistakes or wrongdoing. Subsection C intends to highlight the universal appeal of the concept of secrecy by touching upon some aspects of secrecy at European Union level. This subsection, in other words, shows that not only individual countries but also supranational organizations, as the European Union is, need to rely on the keeping of secrets. In particular, various interinstitutional agreements govern a given EU institution's access to sensitive information held by another EU institution. The fact that specific agreements are concluded reveals that access to sensitive information is restricted for EU entities other than the one that holds such information.

Part II of Chapter 1 is devoted to Congress's oversight function over the executive branch, which is an integral part of the overall authority of the legislative branch. Even though this function may not be exercised incessantly, it turns out to be extremely important as it contributes substantially to reducing executive branch secrecy. Congress, however, is a political branch of the Federal Government, and it may occur that investigations into the executive branch are exploited by members of Congress for personal goals. Richard Nixon, for instance, gained great visibility as a champion of transparency in the Hiss-Chambers case, yet, more than twenty years later, Nixon himself, as President of the United States, tried to cover up Watergate-related conversations with advisors by invoking the existence of absolute executive privilege. Nixon's incoherence over time reveals that transparency obtained by congressional inquiries should be assessed with due caution. The full access doctrine, elaborated by Divoll, is then examined. Such a doctrine advocates Congress's entitlement to have broad access to executive branch information even in such sensitive fields as national security and foreign affairs. Access to information enables Congress not only to detect wrongdoing on behalf of the people, who usually may not rely on much disclosure in such fields, but also to make cognizant appropriation decisions. Accordingly – Divoll observes – Congress must also have broad access to information concerning the gathering of foreign intelligence and the carrying out of covert action, and thus in matters that everyone – at least *prima facie* – would characterize as replete with deep secrets.

Part III deals with some concepts related to secrecy. The first one is the concept of national security, which however does not have a single definition. The executive order on classification of national security information that is currently effective, Executive Order 13526 of 2009, simply identifies national security as including the two sectors of national defense and foreign affairs. It has been noted that traditionally, national security was related inextricably to the military protection of the country from external threats, but it gradually became clear that the scope of national security was much broader than the military domain.

Between the end of the twentieth century and the beginning of the new century, the Hart-Rudman Commission provided an account of diverse threats that were emerging in the new international context. In particular, it is noteworthy its third, final report, wherein the Hart-Rudman Commission recommended a reorganization of the executive branch to ensure a better management of homeland security. Terrorism and cybersecurity are two of the typical threats of the new context, and indeed are specifically addressed in the strategy documents issued – on a periodic basis – by the Federal Executive. The last paragraph of this subsection deals with leaks in the national security domain, and begins with an analysis of the regulation of leaks in the Espionage Act of 1917 as codified in the U.S. Code. The paragraph then touches upon the similar concept of whistleblowing, and refers to scholarly positions stressing that federal legislation does not protect whistleblowers in the domain of national security in a proper fashion. Furthermore, WikiLeaks' unauthorized disclosure of a huge amount of classified information and its implications for the U.S. legal system are addressed. Scholars have argued that the WikiLeaks' structure and its way of operating calls for a new approach towards leaks, distinct from the traditional approach followed in the 1970s to tackle the disclosure of the Pentagon Papers. Scholars also agree that the real impact of WikiLeaks disclosures on the U.S. Government is unclear, at least in the short term. Section B deals with homeland security, a concept that, like the one of national security, does not have a single definition. Homeland security was originally aimed at coping with the terrorism threat, and indeed the Department of Homeland Security was established in the aftermath of the attacks of September 11, 2001. The creation of this department brought about what has been characterized as the greatest reorganization of the executive branch since the end of the 1940s, when the national security administrative apparatus was created. Furthermore, the Homeland Security Act of 2002 contemplated a new exemption to freedom of information, which was incorporated into the scope of Exemption 3 of the FOIA. This exemption allows agencies to withhold information from the public's access pursuant to federal statutes other than the FOIA, provided that the conditions established in Exemption 3 itself are met. The scope of homeland security gradually extended beyond terrorism, and now includes a vast range of matters, such as natural disasters and other accidents that occur on U.S. soil, border and maritime security, and immigration. The tendency of the concepts of national security and homeland security to overlapping is evident, yet a distinction between them is possible. By referring to some observations set out at a 2012 House of Representatives subcommittee hearing and to Morag's standpoint on the issue, I will argue that the scope of homeland security may be identified as capable of including all threats that are only concerned with

U.S. soil. The scope of national security, instead, extends to threats related to the international context, i.e., threats that do not exhaust their impact on a purely domestic environment. Then, basic considerations on the concept of executive privilege are provided. In particular, I will refer to the heterogeneous content of such a concept, and thus to the multiple acceptations by which it can be interpreted.

Chapter 2 deals with the relation between transparency and secrecy in the legislative and judicial branches of the Federal Government. I am aware that this chapter may seem *prima facie* to be off topic, since transparency and secrecy are usually addressed just with respect to the executive branch. However, I deem it proper to provide the reader with outlines of the relation between transparency and secrecy in the other two branches of government. Furthermore, I will show that some of the topics included in this chapter relate to transparency and secrecy in the executive branch. As far as Congress is concerned, while the Congressional Record represents a form of transparency peculiar to the legislative branch, the reasons the members of Congress may invoke to keep floor and committee proceedings secret suggest that the legislative and executive branches are not so different when it comes to claims of secrecy. The reasons that may justify secret sessions in the two Houses of Congress and closed-door meetings and hearings in congressional committees and subcommittees, indeed, recall the exemptions of the FOIA, and lead to conclude that there are some limits to transparency that are common to the whole Federal Government. I will also mention an interesting – albeit dated – theory of Bleisch, who advocates the need for accuracy of the Congressional Record. Among the arguments he deploys is the right of access to information held by public authorities, a right that – he notes – has the First Amendment as its constitutional basis. As to the judicial branch, after pointing out that transparency is a traditional feature of this branch, I will dwell on secrecy in judicial proceedings. The state secrets privilege represents the most typical instrument to invoke secrecy in civil litigation in the interest of national security. Traditionally used to prevent the usage of certain documents as evidence at trial, the application of the privilege was frequently claimed by the Bush administration to obtain dismissal of entire cases. The same section also deals with grand jury proceedings, which feature a high level of secrecy, and considers the military commissions that were established in the aftermath of 9/11 to try suspect terrorists. As to the latter, which represent a product of the war on terror, an interesting position has been set out by Aronson. He has observed that the U.S. Government's policy to keep the military commissions apart from the remainder of the judicial system and to exclude them from public scrutiny ended up producing the opposite

effect to arouse the interest of Americans in such commissions, and thus in the way suspect terrorists were treated. Secrecy, however, is not the general rule governing judicial proceedings. The Supreme Court of the United States has recognized that the First Amendment of the Constitution ensures the public's right of access to court proceedings – namely, to criminal trials – since the early 1980s. A court may deny such access only if it complies with some procedural requirements established by the Supreme Court and by courts of appeals. Finally, paragraph D analyzes the main contents of the Classified Information Procedure Act, which is concerned with criminal court proceedings involving the use and thus the potential disclosure of classified information. The court has to lay down procedures for the admission of classified information as evidence and for its handling during the trial. It is evident that the Classified Information Procedure Act implies another aspect of the relation between transparency and secrecy.

Chapter 3 is the core of the whole work, because it deals with the heart of the relation between transparency and secrecy – how this relation emerges in the executive branch. Part I of this chapter is devoted to executive privilege, a legal institution that is peculiar to the U.S. legal system, at least in its ordinary meaning, which refers to the ability of the executive branch to withhold information from Congress. I will begin with an analysis of Berger's criticism of executive privilege. I am fully aware that his position may be considered dated, especially because his doctrine against the privilege, elaborated in the 1970s, did not have much following. However, his endeavor to deprive executive privilege of any constitutional foundations represents extraordinary evidence of how hard he championed transparency in the relations between the legislative and executive branches. Furthermore, since Berger makes large use of historical precedents dating back to either the British experience or the time of the Framers, i.e., the time in which the U.S. Constitution was drafted, mentioning the arguments his doctrine is based upon provides the reader with a useful historical perspective. Such an historical perspective may be interesting especially in consideration of the fact that especially before the enactment of the Administrative Procedure Act (in 1946) and – later – of the FOIA, the requests for information Congress made in the exercise of its power of inquiry into the executive branch were proved essential to increase the level of transparency within the executive branch itself. Prakash's arguments against executive privilege, which differ from those used by Berger, are reported, as well. Most scholars, however, advocate the existence of executive privilege. Berger's doctrine, indeed – albeit interesting – is not tenable. Some of these scholars have rebutted Berger's various arguments, and their positions, too, are worth mentioning. Not only do these positions

provide further elements for a historical perspective on the U.S. experience; but they also show overall that the congressional power of inquiry into the executive branch does not have such sanctity as Berger tried to assign to it. The term "executive privilege" was coined in the 1950s, even though – it has been noted – the practice whereby the executive branch withholds information from Congress dates back to George Washington, and thus to the dawn of the American Republic. It is also provided an overview of the usage of the term after its formal adoption by the U.S. presidents. Then, it is stressed that the legislative and executive branches of the Federal Government usually reach political settlement to their conflicts concerning access to information, i.e., conflicts arousing from requests for information the executive branch receives from Congress. Courts intervene to solve such conflicts only as a last resort, and thus only when the two political branches of government do not succeed in reaching an accommodation. Paragraph F is devoted to *United States v. Nixon*, a 1974 decision in which the Supreme Court addressed executive privilege for the first time. The Court held that executive privilege is an implicit presidential power recognized by the Constitution, yet it is not absolute. Accordingly, President Nixon's claim of unlimited executive privilege, aimed at denying judicial access to some conversations related to the Watergate scandal the President had with advisors, was rejected. The President's interest in confidentiality – the Supreme Court observed – prevails over the need for judicial access to information only if military, diplomatic, or national security secrets are involved. Finally, President Obama's claim of executive privilege in the so-called "Operation Fast and Furious" is mentioned.

Part II deals with the FOIA. After a brief history of the enactment of the FOIA and of its codification in the U.S. Code, I will stress that the FOIA replaced section 3 of the Administrative Procedure Act, the application of which had not ensured an adequate level of openness. The wording of section 3, devoted to public information, was composed of too generic clauses, and agencies had deployed it to cover up mistakes in the carrying out of their activities. The FOIA, instead, is based on a philosophy of full disclosure. Paragraph C overviews the statutes that contain the main amendments to the FOIA Congress has passed over the years. Such statutes are the following: the 1974 FOIA Amendments Act; the Freedom of Information Reform Act of 1986; the Electronic Freedom of Information Act of 1996; The Intelligence Authorization Act for Fiscal Year 2003; the OPEN Government Act of 2007; the OPEN FOIA Act of 2009. It is also outlined the structure of the Federal Register, which is the official gazette of the executive branch, and of the Code of Federal Regulations, which has more limited content, as it encompasses only agency final rules and regulations.

Then, FOIA provisions are examined. Reference to the Federal Register is germane, since the FOIA begins by pinpointing a series of information agencies have to publish in the Federal Register itself. Then, I will deal with proactive disclosures. The FOIA requires that agencies make available to the public certain categories of records and information established in the act, and today this obligation is fulfilled especially by the publication of such records and information on agencies' official websites. Then, access to agency records and information upon request is analyzed. Section H, instead, underscores that the FOIA applies only to the executive branch, while the other two branches of the Federal Government are outside the scope of the FOIA. Then, the definition of "agency record," which the version of the FOIA that became effective in 1967 did not provide for, is examined. Paragraph J touches upon the charging of fees by federal agencies for processing FOIA requests. I will seek to stress that still today most of the regulation of this matter derives from provisions added by the FOIA Amendments Act of 1986 and from the implementing guidelines issued by the Office of Management and Budget in 1987. Paragraph K deals with the FOIA exemptions. It begins by highlighting that the exemptions embody a compromise Congress identified between the people's right to know and agencies' interest in keeping certain information secret. Since the primary purpose of the FOIA is to ensure that records and information be disclosed as often as possible, agencies are supposed to give a narrow interpretation to the FOIA exemptions. Furthermore, agencies have to comply with the so-called "'reasonably segregable' obligation," and thus separate the non-exempt portion of a record from the portion that may be lawfully withheld from access, and disclose the former. Then, I will overview the content of the nine exemptions enumerated in the FOIA, with a final reference to the exclusions. As to the latter, it is important to underline above all the distinction existing between the situations in which an exclusion applies and those in which an agency resorts to the so-called "Glomarization." Paragraph M addresses FOIA guidelines, and thus the memoranda issued by the President and by the Attorney General on implementation of the FOIA. Firstly, I will provide an account of the memoranda adopted by President Obama both on transparency and on the FOIA, which require that agencies apply a presumption in favor of openness. Secondly, I will analyze the 2009 Attorney General Holder's memorandum on implementation of the FOIA, and compare it to the memoranda issued by former attorneys general Ashcroft and Reno – respectively – in 2001 and 1993. The memorandum issued by Holder re-establishes the level of transparency already provided for by the Reno memorandum, while the Ashcroft memorandum brought about a setback in this regard. It has been observed, indeed, that such a memorandum

substantially turned the right to know ensured by the FOIA into a need to know, as was the case before the enactment of the FOIA. Paragraph L intends to dig deeper with respect to two FOIA exemptions – Exemption 5 and Exemption 1. As to the former, Congress conceded that such an exemption is aimed at ensuring the frank exchange of ideas within an agency and between agencies in the discussion of legal issue or in the formulation of policies, and thus protects the quality of agency decision-making. It is also stressed that the presidential communications privilege, which pertains to the presidential decision-making process – or, as practice shows, to a lower level of decision-making than the presidential one, provided that the President sanctions its invocation – is an integral part of Exemption 5. The most typical content of this exemption, however, is the deliberative process privilege, which is aimed at preserving the candor of agency communications. The fact that these privileges are both included in Exemption 5, even though their scope is not equivalent, proves that executive privilege and the FOIA are related topics. Then, Exemption 1, the exemption concerning national security, is examined. This exemption was significantly amended by the FOIA Amendments Act of 1974, which expressly provided for the ability for courts to conduct *in camera* inspection of classified material relevant in a given FOIA case, and consequently, to perform *de novo* review of the withholding of information from access. Courts, however, have always followed a deferential approach towards agency classifications decisions in consideration of the expertise of executive branch officials in the domains of national security and foreign affairs. Judicial deference applies to agency affidavits, provided that they describe accurately the classified material at issue, and set forth reasons for the propriety of keeping such material classified. Then, I will analyze the classification system of national security information. After a brief history of how this system developed, I will provide an account of the main contents of the executive order on classified information that is currently effective. In particular, three aspects forge the framework of this executive order: the classification levels and the list of the types of information that may be classified, two matters with respect to which the executive order of 2009 did not bring in any substantial novelty; the distinction between original and derivative classification authority; declassification, which is implemented by the carrying out of various procedures laid down by the executive order itself. Finally, the relation of the Department of Homeland Security with classified information is examined. This department has to ensure coordination between all government levels, individuals, and businesses that are involved in the management of homeland security for the accomplishment of its missions. Participants in the homeland security enterprise, however, need to gain access to

classified information handled by the Department of Homeland Security. Specific rules, standards, and programs govern the access to such information by public entities and the private sector.

Part III deals with federal sunshine laws other than the FOIA – namely, the Federal Advisory Committee Act (FACA) and the Government in the Sunshine Act (GITSA). As to the former, its purposes and main contents are outlined. Then, the FACA regulations adopted by the General Services Administration in 2001 are analyzed. Those regulations address the relation between transparency and secrecy with respect to meetings held by advisory committees operating at federal level. The 2001 FACA regulations, for instance, establish a specific proceeding for closure – in whole or in part – of a meeting, and require that the public be ensured timely access to advisory committee records. Advisory committees may deny access to such records by applying FOIA exemptions. Paragraph B, instead, is devoted to the GITSA, and begins with an account of the essential content of the act. Since the transparency requirements established by the GITSA apply only to meetings, it is crucial to identifying what constitutes a meeting under the act, and yet the language of the GITSA is rather unclear thereupon. Then, I will provide an overview of the ten exemptions enumerated in the GITSA by stressing that seven of these exemptions patently recall the FOIA exemptions, and indirect reference to another FOIA exemption may be pinpointed. Furthermore, a series of costs arouse from application of the GITSA. Such costs mainly consist in the usage of techniques whereby agencies subject to the GITSA, i.e., agencies with a multi-member governing body, circumvent the law, thereby avoiding implementation of the GITSA. The most important of these techniques is notation voting, whereby agency members exchange written communications and vote on agency business without holding a formal meeting. Federal courts have considered notation voting compatible with the GITSA.

CHAPTER 1

GOVERNMENT SECRECY AND OTHER CONCEPTS

I. Secrecy

A. Government Secrecy in the United States

1. The Need for Government Secrecy

Governing a community requires the keeping of secrets, and in the United States – as anywhere else – citizens understand that the existence of secrets is crucial to protecting some fundamental interests. That the exercise of sovereign power relies on withholding certain information from public access is a settled principle. As King Louis XIII's Chief Minister Cardinal Richelieu stated in the seventeenth century, "[s]ecrecy is the first essential in affairs of state."[15] The report on government secrecy issued in 1997 by the Commission on Protecting and Reducing Government Secrecy[16], also known as the Moynihan Secrecy Commission or just Moynihan Commission, after its chairman, U.S. Senator Daniel P. Moynihan, [hereinafter – Moynihan Commission Report][17] observes that since American citizens "have a great deal of common sense," they are cognizant of the need for government secrecy, and therefore "accept the proposition that some things must be kept hidden [from public access]."[18] They are capable of grasping the importance of relying on a stable classification system, an excessive shrinking or fluidity of which "[would] compromise vital information and capabilities, and make it harder for the United States to collect information in the future."[19] If the classification system were to start being perceived as precarious and vulnerable – the Moynihan Commission Report continues – the United States would lose

[15] The quotation is found in RICHARD G. POWERS, *Introduction*, in DANIEL P. MOYNIHAN, *Secrecy: The American Experience*, 1 (New Haven, CT: Yale University Press, 1998).

[16] The Commission was established by Title IX of the Foreign Relations Authorization Act for Fiscal Years 1994 and 1995, Pub. L. 103-236, 108 Stat. 382 (April 30, 1994). Title IX constitutes an autonomous portion of the entire statute, and is called "Protection and Reduction of Government Secrecy Act". Section 902 noted, in the findings of the act, that during the Cold War, a vast system of classification of sensitive material gradually developed, resulting in "limit[ing] public access to information and reduc[ing] the ability of the public to participate with full knowledge in the process of governmental decisionmaking." Title IX established, for a two-year period, a bipartisan commission aimed at studying government secrecy in the form of classified material. In particular, Section 903(1) provided that the purpose of the Commission was "to examine the implications of the extensive classification of information and to make recommendations to reduce the volume of information classified and thereby to strengthen the protection of legitimate classified information." The Commission was also entrusted with the purpose "to examine and make recommendations concerning current procedures relating to the granting of security clearances." Section 903(2).

[17] *Secrecy: Report of the Commission on Protecting and Reducing Government Secrecy* (S.Doc. 105-2) (Washington, D.C., Gov't Print. Off., 1997) [Moynihan Commission Report].

[18] Moynihan Commission Report, at xlix.

[19] Ibid.

credibility domestically but above all abroad. Informants and foreign countries, indeed, "would be much more reluctant to confide in U.S. intelligence or government officials for fear of being compromised in a rush to declassify."[20]

On April 28, 1975, Attorney General Edward Levi[21] delivered an address on government secrecy[22] before the Association of the Bar of the City of New York, which – as Chesney has argued – "captured the essence of the secrecy dilemma."[23] Levi points out that in recent years, a position that advocates absolute transparency and – accordingly – stigmatizes government secrecy has sprung up, mostly as a reaction to President Nixon's claim of an unlimited scope of executive privilege to prevent a special prosecutor from gaining access to recordings and transcripts of conversations between the President and his advisors related to the Watergate scandal[24]. Moving from the idea that government secrecy is always aimed at covering up mistakes or wrongdoing, the Attorney General observes, such a position ends up characterizing any form of secrecy pertaining to the U.S. Government – namely, the executive branch – as an unjustifiable "abridgment of the people's right to know

[20] Ibid.

[21] See ROBERT M. CHESNEY, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249, 1263-64 (2007) (noting that President Ford appointed Levi as Attorney General in early 1975, and thus at a time in which "the public's faith in government had plummeted as a result of, among other things, the Watergate scandal and revelations in the media and Congress concerning abusive surveillance practices carried out within the United States in the name of national security." In this regard, the Author mentions the final report issued by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Sen. Church, and indeed also known as the Church Committee, which between 1975 and 1976 conducted an investigation into a series of abuses conducted by intelligence agencies, ranging from warrantless surveillance of American citizens to covert action. Id., 1264 note 93 (referring to SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS, *Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities of the United States Senate*, S. Rep. No. 94-755 (1976)).

[22] Address by the Honorable Edward H. Levi, Attorney General of the United States, Before the Association of the Bar of the City of New York, 42 West 44th Street, New York, New York (April 28, 1975) [*Attorney General Levi's Address*], available at https://www.justice.gov/ag/aghistory/levi/1975/04-28-1975.pdf.

[23] CHESNEY, *State Secrets and the Limits of National Security Litigation*, supra note 21, at 1264.

[24] *Attorney General Levi's Address*, at 2. The Watergate scandal and its judicial, indeed, constitute a necessary premise of Levi's address. The notorious Watergate scandal, an affair concerned with political espionage against the Democratic Party, eventually drove from office President Nixon, who resigned on August 9, 1974. For bibliographic references thereof, see FAYE JONES, *Twenty-Five Years After Watergate: A Selective Bibliography*, 51 Hastings L.J. 793 (2000).

[…].”[25] According to Levi, such a position may not be espoused, as it fails to consider – and thus underestimates – the need for government secrecy, which turns out to be “common to all governments, [and, above all,] essential to ours since its formation.”[26] Some degree of secrecy, however, ensures effectiveness in the carrying out of essential functions by the executive branch[27]. In particular, the functions the address pinpoints as functions requiring the withholding of certain information from public access are the ones that closely embody the state sovereignty – law enforcement[28], national security[29], and foreign affairs[30]. As to the latter domain, Levi mentions a 1948 decision, *C & S Air Lines v. Waterman Steamship Corp.*[31], wherein the Supreme Court held that reports prepared by intelligence agencies should be made available just to the U.S. President in consideration of its leading role in the field of foreign affairs[32]. Furthermore, the Attorney General argues that total disclosure of records and information held by the executive branch in the fields of law enforcement, national security, and foreign policy would bring about the paradoxical effect of endangering or even thwarting “the government’s right to know,”[33] for the executive branch could not gain and keep certain types of information that require secrecy. As a result – Levi continues – the executive branch could not ensure the carrying out of “what has been said to be the basic function of any government, the protection of the security of the individual and his property.”[34] Reference to the gathering of intelligence information and – more generally – to the system of classification of information pertaining to the national security and foreign relations of the United States is clear.

2. Government Secrecy as Addressed at a 1973 Senate Subcommittee Hearing

Before Attorney General Levi’s address, in 1973, the Subcommittee on Administrative Practice and Procedure and Separation of Powers of the Committee on the

[25] *Attorney General Levi’s Address*, at 1-2.
[26] Id., at 2.
[27] Id., at 4.
[28] Id., at 16-17.
[29] Id., at 17-19.
[30] Id., at 19-20.
[31] 333 U.S. 103 (1948).
[32] Id., at 111 (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world.”)
[33] *Attorney General Levi’s Address*, at 21.
[34] Ibid.

Judiciary, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations of the U.S. Senate held a series of hearings that dealt with – *inter alia* – government secrecy[35]. At the June 26, 1973 hearing, Sen. Edward M. Kennedy, Chairman of the Subcommittee on Administrative Practice and Procedure and Separation of Powers, made the following statement:

"If yesterday's testimony at the caucus room teaches us anything, it demonstrates beyond debate that Government secrecy breeds Government deceit, that executive privilege nurtures executive arrogance, that national security is frequently the cover for political embarrassment, and that the best antidote to official malfeasance, misfeasance, and nonfeasance is the sunshine and fresh air of full public disclosure of official activities."[36]

Sen. Kennedy was referring to the June 25 hearing, included in the then-ongoing Watergate hearings. Those hearings were revealing – the Senator noted – "clandestine activities of Federal officials,"[37] which President Nixon tried to cover up by raising a claim of absolute executive privilege. Sen. Kennedy's statement identifies two key aspects of government secrecy: executive privilege, meant as the ability of the Chief Executive and high officials to invoke the need to keep certain executive branch information secret; and national security, the protection of which is frequently appealed to as a justification for secrecy. But above all, Sen. Kennedy argues that secrecy within government – namely, within the executive branch – tends to foster the commission of wrongdoing, and that transparency is the best means to fight such a tendency. By noting that wrongdoing potentially thrives in secrecy, the Senator sets out an entrenched principle, so he does not contend anything new. It has been self-evident for centuries, indeed, that secrecy may be deployed to cover up any type of misbehavior[38]. However, not all secrets imply bad faith, as is often the case that secrecy serves to protect essential interests. By arguing that "while not all secrets are discreditable, all that is discreditable and all wrongdoing seek out secrecy,"

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[35] *Freedom of Information, Executive Privilege, Secrecy in Government* – Hearings before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Committee on the Judiciary, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, 93rd Cong., 1st Sess. (Washington, D.C., Gov't Print. Off., 1973).

[36] Id., at 209.

[37] Id., at 1 (hearing of June 7, 1973) (opening statement of Sen. Edward M. Kennedy).

[38] See EZRA C. SEAMAN, *The American System of Government*, 73 (New York, 1870) (arguing that secrecy "favors intrigue and fraud, corruption and crime.")

Bok has suggested that secrecy turns out to be a neutral concept[39]. To put it differently, the fact that crimes and misbehavior in general are always associated with a penchant for secrecy does not entail *per se* the formulation of a value judgment – in this case, a negative one – upon the concept of secrecy.

At the same hearing of June 26, Attorney General Elliot L. Richardson, too, addressed government secrecy. He defines secrecy as "a paradox," for it turns out to be at the same time "a threat as well as a necessary incident to democratic government."[40] Absolute secrecy would be against the law, but certain information must be kept confidential. The Attorney General recalls that according to a commonly accepted principle, "the public interest is, at times, better served by nondisclosure."[41] The President's role, established by the Constitution, as Commander-in-Chief and his authority in the domain of foreign affairs – the Attorney General observes – "impl[y] a power to keep secrets in situations where the national interest would be impaired by the disclosure [of information]."[42]

As the Supreme Court contended in *Dep't of the Navy v. Egan*[43], the authority of the President to classify information bearing on national security and determine who is allowed to gain access to such information derives "primarily" from the President's role as "Commander in Chief of the Army and Navy of the United States,"[44] and does not require "any explicit congressional grant" to exist[45]. A 1996 memorandum prepared by the Office of Legal Counsel (OLC) of the Department of Justice argued that since the President is not only Commander-in-Chief of the armed forces and head of the executive branch, but also the nation's sole organ competent to represent the United States in external relations, the President himself has "ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch."[46] Accordingly, even when Congress makes requests for intelligence information, the determination whether to disclose the sought information to members of Congress is

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[39] SISSELA BOK, *Secrecy: On the Ethics of Concealment and Revelation*, 26 (New York, 1982).

[40] *Freedom of Information, Executive Privilege, Secrecy in Government* – Hearings, supra note 35, at 215 (statement of Attorney General Elliot L. Richardson).

[41] Id., at 232.

[42] Id., at 245.

[43] 484 U.S. 518 (1988).

[44] Art. II, § 2, U.S. Const.

[45] *Egan*, 484 U.S., at 527 (referring to *Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961)).

[46] Memorandum from Christopher H. Schroeder, Office of Legal Counsel, to Michael J. O'Neil, General Counsel of the Central Intelligence Agency (November 26, 1996), p. 4.

entrusted to "someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President."[47] In this memorandum, therefore, the OLC underlines that the President has always to authorize – whether directly or indirectly – the flow of intelligence and other classified information to Congress[48]. Agency employees not immediately related to the President – the memorandum notes – may disclose to members of Congress information pertaining to national security only if they are properly authorized to do so by executive branch personnel "who [in turn] derive their authority from the President."[49] Even though this memorandum adopts too a restrictive interpretation of Congress's role in matters involving classified information, it rests on an assertion that enjoys consensus among scholars and judges: The system of classification has constitutional underpinnings in the U.S. President's role as Commander-in-Chief and in his authority in the field of foreign affairs.

3. The Deep and Shallow Secrets Doctrine and Its Application to the Public Sector

In a 1988 book[50], Scheppele sifted the concept of secrecy by proposing a distinction between deep and shallow secrets, which is clearly rooted in the Author's background in the field of sociology[51]. According to such a theory – devised for a common law system, as the title of the book clarifies – a given secret falls within the category of deep secrets or rather in that of shallow secrets depending on whether and to what extent its existence is predictable. A secret is shallow whenever the target, i.e., the concerned party, knows or at least suspects that certain information is being concealed from her[52]. As Scheppele explains, a shallow secret implies that the target "has at least some shadowy sense" of the existence of the secret[53]. On the contrary, a secret is deep whenever under no circumstances can the

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] KIM L. SCHEPPELE, *Legal Secrets: Equality and Efficiency in the Common Law* (University of Chicago Press, Chicago, 1988).

[51] There is no better evidence of such an assertion than mentioning the title of Chapter I of Scheppele's book itself: "The Sociology of secrecy."

[52] See SCHEPPELE, *Legal Secrets*, supra note 50, at 21 ("When the target suspects that there might be a secret, we find *shallow secrets*.") (italics in original). By looking through Scheppele's distinction, Strudler has contended that "there must be some tangible basis for suspecting the existence of the information comprising [a] shallow secret." ALAN STRUDLER, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. Rev. 337, 367 note 102 (1997).

[53] SCHEPPELE, *Legal Secrets*, id., at 76.

target gain awareness that there is a secret, and thus that certain information or documents are excluded from disclosure. Scheppele characterizes the target with respect to deep secrets as someone who is "completely in the dark, never imagining that relevant information might be had."[54] It is not a matter of skillfulness in either detecting hidden information or in sensing that something is not revealed, as no clue is directed at the existence of a secret[55]. For the very reason that in deep secrets, the target is objectively unable even to raise a doubt that someone might have failed to divulge some material or at least to suggest that such material exists, the target is not stimulated to take on a search for information[56].

Sheppele's doctrine is better suited for the private sector than for the public one[57], as Scheppele herself concedes[58], and yet some scholars have tried to apply the doctrine to the latter. It is possible to assume the existence of a correspondence between the amount of secrecy the government and the administration of a certain country deploys and the number of deep secrets that are likely to be found in that country. To put it differently, what Moynihan, with reference to the system of classified information the United States gradually developed during the Cold War, called a "culture of secrecy"[59] is fertile soil for deep secrets. Furthermore, Pozen has underlined another highly probable correspondence by observing that "[i]llegal programs will tend to be deeper secrets than legal ones […]."[60] A policy or

[54] Id., at 21.

[55] Id., at 75-76 ("One can be clever and still not learn about deep secrets because one does not even know that there might be information out there that matters.")

[56] Id., at 76 (observing that it is rationally impossible to decide "to search for information that, from the searcher's perspective, does not exist.")

[57] See GARY MARX, *The Law's Secrets*, 88 Mich. L. Rev. 1614, 1621 (1990) (suggesting applying Scheppele's doctrine – with due adjustments – to the public sector, namely to "sealed records," by which he means classified information, and electronic surveillance).

[58] After noting that common law – the humus wherein her doctrine has thrived – is "overwhelmingly private law," Scheppele expressly excludes the state – hence, public and administrative law – from the subject matter of her analysis. Id., at 323. Then, she adds a consideration that seems quite mysterious to me. She concedes, as is obvious, that states – very likely meant as governments – frequently resort to secrecy, but argues that for example, "the justification of national security is simply not a credible claim for other actors." Ibid. It is undeniable that the information asymmetry characterizing the public sector does not exist in the private sphere. In the relation between a public authority and a citizen, there is an inherent gap of knowledge, especially in fields involving sensitive information. In private contracts and private law in general, instead, the parties to a relation should be ensured "equal access" to information that is kept secret. The parties – Scheppele contends – "[must] have equal probabilities of finding the information if they put in the same level of effort." Id., at 109.

[59] MOYNIHAN, *Secrecy*, supra note 15, at 154.

[60] DAVID E. POZEN, *Deep Secrecy*, 62 Stan. L. Rev. 257, 274 (2010).

activity a certain government decides to conceal in an attempt to escape public scrutiny as much as possible, indeed, suggests that the government is aware that such a policy or activity is – or may be – incompatible with the legal system. Such a pathological usage of deep secrets somehow recalls what Scheppele has envisioned thinking of a relation between equal parties: One party will probably exploit the existence of a deep secret the other party knows nothing about[61].

Kitrosser has advanced a distinction aimed at adapting the categories of deep and shallow secrets to the public sector – the distinction between macro and micro secrecy[62]. The latter essentially refers to the execution of the laws by the President and the whole executive branch[63]. In her view, such a category recalls that of shallow secrets. Indeed, since the execution of statutes is a function the Constitution expressly vests in the executive branch, Congress is aware that in performing this function, the executive branch may deploy secrecy, and thus Congress itself has the ability to pinpoint such secrecy and expose it. Macro secrecy, instead, may not be prevented, since neither the other two branches of government nor private citizens know anything about the usage of such secrecy by the Executive[64]. The same Author has also argued that Scheppele's distinction between shallow and deep secrets implies something more than this single alternative. Each of the two categories may actually be divided into two subcategories: "very shallow [and] minimally shallow," on the one hand; "minimally deep [and] very deep," on the other hand[65]. Furthermore, Kitrosser has excluded the compatibility of deep secrecy with the Constitution. The executive branch – she maintains – is allowed by the Constitution to deploy only "shallow and politically checkable"

[61] SCHEPPELE, *Legal Secrets*, supra note 50, at 77 (arguing that "[f]orbidding deep secrets prevents one party from taking advantage of another who cannot defend herself.")

[62] See HEIDI KITROSSER, *Supremely Opaque?*: *Accountability, Transparency, and Presidential Supremacy*, 5 U. St. Thomas J.L. & Pub. Pol'y 62, 64 note 9 (2010) (maintaining that the concepts of "macro" and "micro" secrets "parallel in important respects" those of "deep" and "shallow" secrets).

[63] Id., at 64 (stressing that the statutes enacted by Congress are a typical example of "macro-transparency," yet they may authorize the President and federal agencies to execute them in secret, in which case the execution of the laws falls within the concept of "micro-secrecy").

[64] Ibid. (arguing that macro secrets "are those about which outsiders – in this case Congress, the courts, and the public – are unaware and thus cannot even try to check.")

[65] HEIDI KITROSSER, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 Iowa L. Rev. 489, 514 (2007).

secrets[66], and thus secrets the other branches of the Federal Government are capable of detecting.

Whether or not the underlying objective of a deep secret is to cover up misconduct, a government tends to appeal to this type of secrets mainly in domains wherein a certain amount of secrecy is inevitable, such as national security[67]. As Pozen has argued, not only may it happen that disclosure of a given program undermines the achievement of the purposes of this program[68], but – more generally – policies in the national security domain tend to "involve matters of life and death, as well as some of the most morally and legally controversial activities taken by government, and therefore raise the stakes of secrecy […]."[69] The Federal Executive may take advantage of the need for secrecy in the national security domain to keep certain policies secret, and thus to shield them not only from access by the general public but also from congressional oversight[70]. Deep secrets are better suited for the achievement of such objectives than shallow secrets. As Pozen himself has observed, "national security policymaking is a natural field in which to expect officials to gravitate toward depth [of secrecy]."[71]

Seemingly, covert action, whose scope involves both the field of national security and that of foreign affairs, represents a typical example of deep secrecy, but its regulation in the U.S. Code does not support such a *prima facie* assertion. Cover action is not illegitimate *per se*, even though U.S. presidents are supposed to resort to it only if they deem covert action to be the only way to achieve certain objectives. Section 3093(a) of title 50, U.S. Code, indeed, is formulated in the negative form to stress that the general rule forbids covert action, the usage of which therefore is meant by statutory law as an exception to the rule. As noted, a covert action is legitimate only if the President considers such an action "necessary

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[66] Ibid.

[67] POZEN, *Deep Secrecy*, supra note 60, at 275 (pointing out that "deep secrecy may be most likely to occur, and to raise the most vexing problems, in the area of national security.")

[68] Ibid. ("Publicizing information about [national security] policies […] poses a special risk of vitiating the underlying objective.")

[69] Ibid.

[70] See KITROSSER, *Supremely Opaque?*, supra note 62, at 64 (observing that if agencies operating in the national security domain were not obliged to share sensitive information with congressional intelligence committees – and thus, from the opposite perspective, if these committees could not make requests for intelligence information -- there would be little to stop the executive branch from secretly circumventing statutory requirements, and thus from transforming micro-secret programs into macro-secrets.")

[71] POZEN, *Deep Secrecy*, supra note 60, at 275.

to support identifiable foreign policy objectives of the United States and is important to […] national security […].” Therefore, the President of the United States is granted discretion as to the *an* and the *quando* (the “if” and the “when”) of covert action, while the *quid* – i.e., the content, and thus the details of operations – will be probably for the head of the agency or of another entity involved to determine. As Radsan has maintained, “the question is not whether [the United States] should engage in covert action, but how often and under what circumstances.”[72] For each covert action he authorizes, the President issues a finding, which has to meet the conditions laid down in paragraphs (1) through (5) of subsection (a). In brief, each finding has to be in writing and precede the carrying out of operations, unless there is an impellent need to act immediately. In such a case, a written record must be formed simultaneously with the adoption of the decision by the President, who has also to prepare a written finding thereof as soon as possible, “but in no event more than 48 hours after the decision is made.”[73] Furthermore, the President is required to specify in each finding “each department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in [a given covert] action.”[74]

Congress has the right to be informed of any covert action set by the Chief Executive. Under subsection (b), the Director of National Intelligence and the heads of all departments, agencies, and other entities of the Federal Executive involved in a given covert action have to ensure that by providing Congress with information on such an action, they not cause the unauthorized disclosure of classified information concerning “exceptionally sensitive matters […].” They have to keep the congressional committees on intelligence “fully and currently informed of all covert actions [the United States takes on], including significant failures.”[75] Paragraph 2 clarifies that the right of access these committees enjoy is absolute, so departments and agencies are required to comply entirely with requests for information instrumental in the exercise of Congress’ oversight function. Subsection (c)(1) provides that the President has to present written reports containing the finding issued for any covert action to the congressional intelligence committees before covert action gets started. Paragraph (2), however, addresses the case in which the President determines that access to information on a certain covert action at that very moment by all members of intelligence committees would be detrimental to “vital interests of the United States […].” In such a case, access to the

[72] JOHN RADSAN, *An Overt Turn on Covert Action*, 53 St. Louis U. L. J. 485, 487 (2009).
[73] 50 U.S.C. § 3093(a)(1).
[74] Section 3093(a)(3).
[75] Section 3093(b)(1).

President's report is restricted – substantially – to the chairpersons of congressional intelligence committees, and to majority and minority leaders of the two Houses of Congress. Paragraph (5)(A) requires that the President set forth the reasons for his decision to limit access to the finding concerning a certain covert action by issuing a written statement. The President has also to ensure that by 180 days from issuance of such a statement, each member of the congressional intelligence committees have access to it[76]. All these provisions granting Congress broad access to information on covert action lead to conclude that covert actions do not constitute deep secrets, at least according to statutory law.

A deep secret, however, is not bound to remain as such in perpetuity. The regulation of classification systems, indeed, usually subjects the classification of information to expiration by providing for mechanisms for automatic declassification, which are found, for instance, in the U.S. legal system[77]. Furthermore, deep secrets may be brought to light by investigations conducted by the legislative branch, which often determine the added, positive effect of exposing wrongdoing perpetrated by the Executive and its apparatus. As Kitrosser has noted, by exercising its power to inquire into the executive branch, for example, Congress succeeded in taking off the veil of secrecy that surrounded the Watergate tapes[78]. The investigation carried out by the Senate Select Committee on Presidential Campaign Activities – she argues – resulted in turning the deep secret concerning the existence of such tapes into a shallow secret, and the next step to take was to examine their content[79]. The exposure of misconduct may also ensue from whistleblowing and leaks. Leaks and revelations coming from whistleblowers have been somewhat frequent in the American experience in the past few decades, even though it is impossible to envision their usage because such instruments of transparency require that an agency employee or someone related anyway to the executive branch take the initiative. By moving from the fact that leaks and whistleblowing occur on a regular basis, Samaha has argued that "the United States has

[76] Section 3093(c)(5)(B)(i).

[77] Section 1.5, E.O. 13526. See infra.

[78] See KITROSSER, *Secrecy and Separated Powers*, supra note 65, at 529 (arguing that "[i]t was only through its capacity to question former presidential aide Alexander Butterfield that the Senate Select Committee on Presidential Campaign Activities discovered the [Watergate] tapes' existence in the first place.")

[79] Ibid. ("Once the tapes became a shallow rather than a deep secret, further legal and political maneuvering could take place in an effort to discover their content.")

an active though informal system of information access that makes unauthorized disclosure possible and even routine."[80]

B. Reaching a Compromise Between Transparency and Secrecy

1. The Need to Strike a Balance Between Transparency and Secrecy and Between Democracy and Efficiency

Government secrecy is inevitable not only in the United States but anywhere in the world, as transparency is not the only interest at stake when governments and the related administrative apparatus perform their functions. National security represents the archetype of those domains wherein a compromise between transparency and secrecy is necessary[81]. Reaching such a compromise in the domain of national security has been a primary concern since the early days of the American Republic[82]. If a balance between secrecy and transparency is often hard to strike with respect to national security and other matters that may require to seal information by applying secrets, the conundrum is actually more complicated. This balance, indeed, underlies another one, which concerns two essential values – democracy and efficiency of the executive branch as a whole in conducting its own business. As Samaha argues, granting the public access to information formed or held by agencies of the executive branch or by other entities acting on behalf of or under the supervision of the Executive is necessary for a democratic regime. Yet, the statutes regulating access to such information must ensure that the level of transparency not jeopardize executive efficiency[83]. Furthermore, reaching a sound compromise between the

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[80] ADAM M. SAMAHA, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. Rev. 909, 919 (2006).

[81] See Note, *Mechanisms of Secrecy*, 121 Harv. L. Rev. 1556, 1558 (2008) (maintaining that "[e]ven strongly committed transparency advocates recognize that sometimes the government must be able to operate in secret," and pinpointing the national security field as a typical example in this regard). By doing so – the Note continues – they "implicitly conced[e] that other interests can outweigh the need for transparency." Ibid.

[82] See *Examining Department of Justice's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case* – Hearing before the Senate Judiciary Committee, 109th Cong., 2nd Sess. (June 6, 2006) (prepared statement of Sen. Patrick Leahy) (arguing that "strik[ing] the proper balance between secrecy and openness in matters that touch on national security […] is an issue of paramount concern that has vexed our nation since its founding and continues to challenge us since the world changed on September 11, 2001.")

[83] See SAMAHA, *Government Secrets*, supra note 80, at 913.

people's right to know and the need to foster the functioning of the executive is even harder when a government must cope with an emergency, thus in a critical situation, such as the one the United States found itself in after the September 11, 2001 attacks. Pallitto and Weaver argue that the legislation the U.S. Congress passed as a response to such attacks – namely, the USA PATRIOT Act of 2001[84] and the Homeland Security Act of 2002[85] – shows a close "nexus between secrecy and efficiency […]."[86] The Authors pinpoint such a nexus not only as "a recurring theme in the Bush administration's anti-terror policy since 9/11," but -- in more general terms – as a key to understanding the whole war on terror the Administration engaged in[87]. In emergencies, the compromise between secrecy and transparency tends to lean towards the former, as that between democracy and efficiency does towards the latter. As a result, relying on approval by most citizens, the Bush administration – the Authors continue – deploys a good deal of government secrecy "in exchange for the efficient operation of anti-terror programs."[88] Pallitto and Weaver, indeed, have provided various examples demonstrating that in the balance to strike between democracy, as a value that implies to opt for transparency, and efficiency, as a value that – on the contrary – is in a symbiotic relation with secrecy – the two statutes mentioned above chose the latter[89].

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[84] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act of 2001), Pub. L. 107-56, 115 Stat. 272 (October 26, 2001).

[85] Pub. L. 107-296, 116 Stat. 2135 (November 25, 2002).

[86] ROBERT M. PALLITTO – WILLIAM G. WEAVER, *Presidential Secrecy and the Law*, 124 (The Johns Hopkins University Press, Baltimore, 2007).

[87] Ibid.

[88] Id., at 125.

[89] Id., at 126-128 (underscoring that as to electronic surveillance, title II of the USA PATRIOT Act amended the FISA and federal criminal law to "blu[r] the line between intelligence and law enforcement," and facilitate the sharing of information between agencies working in these two fields, while at the same time it was made very hard for targets to get aware that they were put under surveillance). Similarly, the USA PATRIOT Act also reduced the guarantee traditionally granted to those who may be subject to criminal prosecution by grand jury secrecy. The Authors observe that "[a]s a result of the lifting of grand jury confidentiality, the balance between government efficacy and individual privacy shifts decisively in favor of the government." Id., at 128. On the one hand, government attorneys were allowed to share information obtained in the course of grand jury proceedings with federal agencies "for any reason that is even tangentially connected to national security." Id., at 129. On the other hand, people involved in such proceedings were not notified of the disclosure of material to agencies. Ibid. As far as the Homeland Security Act of 2002 is concerned, instead, the Secretary of the Department of Homeland Security was devised to have a pivotal role in dealing with homeland security and to handle "access to an unprecedented amount of

2. Risks of Excessive Secrecy

Roberts observes that national security and government secrecy appear to be "inseparable" concepts[90], as it is impossible to apply absolute transparency in the field of national security. The military, for instance, relies upon secrecy to safeguard the strategic information it possesses[91], and so do the agencies belonging to the intelligence community[92]. At times, unauthorized disclosure of extremely sensitive information is deemed to constitute such a serious threat that this information is subject to special access programs[93], the purpose of which is to ensure more strongly than the ordinary classification system does that the concerned information be not disclosed. The regulation of special access programs is currently found in Executive Order 13526, which governs the classification of national security information[94]. Section 4.3(a) pinpoints the persons within the Federal Executive that have the power to establish a special access program, unless the President of the United States determines otherwise. Such persons are the following: the Secretaries of State, Defense, Energy, and Homeland Security; the Attorney General; the Director of National Intelligence; or the principal deputy of each of the authorities and entities just mentioned. However, only the Director of National Intelligence may create special access programs whose scope concerns exclusively intelligence activities, and thus does not extends to the

information [within the Federal Executive]." Id., at 139. Not only can the Secretary of the Department of Homeland security – the Authors note – gain "almost unlimited access to information;" the Secretary "can also unilaterally dent access to others without possibility of review." Id., at 140.

[90] ALASDAIR ROBERTS, *National Security and Open Government*, 9 Geo. Pub. Pol'y Rev. 69, 69 (2004).

[91] Ibid. ("To protect the country, we must keep secrets about the capabilities of weapons and the location of troops.")

[92] On December 4, 1981, President Reagan issued Executive Order 12333, 46 Fed. Reg. 59941, which – inter alia – pinpointed the Director of National Intelligence as the head of the Intelligence Community, a role previously exercised by the CIA. The Intelligence Community is an association of agencies – currently, sixteen – whose mission includes carrying out intelligence activities "necessary for the conduct of foreign relations and the protection of the national security of the United States […]." Section 1.4., E.O. 12333.

[93] See Moynihan Commission Report, at 26 (mentioning the Congressional Emergency Relocation Site, the information on the existence of which was declassified in 1994, as an example of a long-lasting special access program). The structure, located in West Virginia, was built during the Cold War to house the entire Congress and a part of its staff employees in case serious national security emergencies occurred. Ibid.

[94] Executive Order 13526 ("Classified National Security Information"), 75 Fed. Reg. 707 (December 29, 2009).

military domain. From this provision, it may be inferred that the Director of National Intelligence is the person – except for, obviously, the supreme role of the President of the United States – who is empowered to determine when intelligence information needs such a protection that it must fall within a special access program. This authority is consistent with the role of the Director of National Intelligence as the head of the Intelligence Community[95]. It is also prescribed that the number of special access programs be kept "at an absolute minimum […]." Subsection (a) specifies that a statute may require a special access program or such a program may be established by the persons mentioned above, provided that two conditions are jointly met. The executive branch official or member of the Cabinet establishing a special access program, indeed, has to determine in a finding that there exists an exceptional threat to certain information[96], and the ordinary rules and procedures governing access to information having the same classification level as that to subject to the special access program "are not deemed sufficient to protect the information from unauthorized disclosure."[97] Furthermore, consistent with the exceptional nature of such programs is the prescription that access to them be restricted to a "reasonably small and commensurate" number of persons[98], which is for each individual program to identify. Section 4.3(b)(3), however, specifies that other than an oversight program over each special access program, established pursuant to section 5.4(d) of the Executive Order, the Director of the Information Security Oversight Office enjoys unlimited access to all special access programs. In the event of the extremely sensitive nature of a given program, an agency head may direct that the right of access to the program be granted only to the Director of the Information Security Oversight Office, and thus not extend to any other employee or official. Therefore, except for the supreme role the Constitution assigns to the President of the United States, if on the one hand the Director of National Intelligence is the highest (or second-highest) authority as to the establishment of special access programs, the Director of the Information Security Oversight Office is the highest (or second-highest) authority as to access to these programs.

However, history shows that excessive secrecy within the executive branch may prove detrimental to effectiveness in the conduct of administrative business. As far as the military domain is concerned, Bok has provided an example concerning the failure of the

[95] See supra note 92.
[96] Section 4.3(a)(1) E.O. 13256.
[97] Section 4.3(a)(2).
[98] Section 4.3(b)(1).

United States' helicopter incursion into Iran in April 1980, a military operation aimed at rescuing some American citizens, who had been illegally imprisoned in Teheran[99]. The Author emphasizes that the operation turned out to be a fiasco in part due to a large amount of secrecy, which characterized both the planning of the mission and its performance. To put it differently, the excessive zeal of the officers in charge of the operation in restricting disclosure information on the operation even to those directly involved in it contributed significantly to the failure of the mission. The members of the squad, indeed, were individually acquainted with just pieces of information strictly necessary for them to fulfill the respective tasks[100]. The Author continues by noting that in the course of the operation, "crew members were under such heavy secrecy restrictions that they could not coordinate their activities."[101] An official report prepared by a group charged with analyzing the dynamics of the operation found that the decision to force the helicopters to keep complete radio silence proved crucial to the failure of the operation[102].

Furthermore, secrecy in the national security domain should not go so far as to hamper cooperation and flow of information between agencies of the executive branch. The poor sharing of information and data between federal agencies engaged in intelligence or law enforcement activities, indeed, potentially jeopardizes the country's protection. In this regard, the September 11, 2001 terrorist attacks on U.S. soil represent a fitting example of what implications a scarce flow of information within the executive branch may entail. On

[99] See BOK, *Secrecy: On the Ethics of Concealment and Revelation*, supra note 39, at 195.

[100] Ibid. (arguing that "information was only parceled out to each member according to what he was thought to need to play his particular role.")

[101] Ibid.

[102] See DEP'T OF DEFENSE – JOINT CHIEFS OF STAFF, *Rescue Mission Report*, 48 (Washington, D.C., U.S. Gov't Print. Off., 1980) (pointing out that as the helicopters lost sight of one another and thus could not rely upon light signals anymore, "each separate element lacked vital information.")

the one hand, the 9/11 Commission[103] concedes in its final report[104] that in such a case, putting together bits of information collected by different agencies to build a comprehensive picture was very complicated[105], especially because of the transnational nature of the affair[106]. On the other hand, firstly, the agency action over the months preceding the attacks was featured by many omissions[107] and by an overall tendency to underestimating the terrorism threat on U.S. soil[108]. Secondly – and this is the most important aspect here – the exchange of information within the Federal Executive was totally insufficient[109].

As the Commission points out, the sharing of information pertaining to potential threats to national security between the agencies of the intelligence community and those

[103] The National Commission on Terrorist Attacks upon the United States, also known as the 9/11 Commission, was an independent, bipartisan commission established by the Intelligence Authorization Act for Fiscal Year 2003, Pub. L. 107-306, 116 Stat. 2383 (November 27, 2002). The Commission was established – within the legislative branch – and regulated by title VI of the act, codified at 6 U.S.C. § 101 note. Section 602 of the act entrusted the Commission with multiple purposes: namely, to conduct an accurate analysis of the facts and circumstances concerning the 9/11 al Qaeda attacks and their causes; to provide an accounting of the response by the United States in the aftermath of the assault; and to make some recommendations aimed at improving the capacity of the executive branch to prevent future acts of terrorism. Therefore, as section 604(a)(1)(A) clarified, the primary function of the Commission was to carry out a detailed investigation over the terrorist attacks and all related circumstances. The Commission performed this function especially by deploying a great deal of testimony.

[104] Final Report of the National Commission on Terrorist Attacks Upon the United States (also known as "The 9/11 Commission Report") (Norton ed., 2004).

[105] Id., at 355 ("From the details of this case, or from the other opportunities we catalogue in the text box, one can see how hard it is for the intelligence community to assemble enough of the puzzle pieces gathered by different agencies to make some sense of them and then develop a fully informed joint plan.")

[106] Ibid.

[107] Id., at 353-357 (underlining the lack of an effective management system of transnational operations).

[108] Id., at 263 (emphasizing a clear gap in the activities aimed at tackling the terrorism threat out of the U.S. borders and in the country's territory). While agencies operating overseas were monitoring adequately such a threat and had already taken numerous preventive actions thereupon, "[f]ar less was done domestically […]." Ibid. Agencies dealing with foreign intelligence were focused on the situation overseas, and domestic agencies – by contrast – tended to overlooking what was not directly related to the U.S. soil. The 9/11 attacks – the Commission observed – "fell into the void" left by foreign and home operations, as "[n]o one was looking for a foreign threat to domestic targets." Ibid.

[109] Id., at 353 (arguing that information concerning the terrorism threat in possession of various agencies "was not shared, sometimes inadvertently or because of legal misunderstandings.") The report also provides a list of cases in which the CIA and the FBI failed to share with each other significant information on movements of possible Muslim terrorists. Id., at 355-356.

charged with law enforcement missions "was not a priority before 9/11."[110] Had the flow of information within the executive branch been more widespread, especially with a higher degree of information sharing between intelligence and law enforcement agencies, there would have been much more chances for the United States to thwart the al Qaeda's plot. As the Commission concedes, "[t]he biggest impediment to all-source analysis – to a greater likelihood of connecting the dots – is the human or systemic resistance to sharing information."[111] Most of the times, certain information is shared only if an agency demonstrates the existence of a specific need to know. In other words, the agency possessing the information tends not to share it with other agencies proactively, but only if it is asked to do so. According to the Commission, this is a typical Cold-War approach to intelligence information that proves outdated. The approach to follow – the Commission argues – calls for the overcoming of the assumption that "the risk of inadverted disclosure outweighs the benefits of wider sharing," and therefore the passage from "a 'need to know' culture of information protection [to] a 'need to share' culture of integration."[112]

3. Transparency as a Remedy Against Groupthink

Transparency is an essential tool to preventing the commitment of any wrongdoing, for the prescription that executive branch business be made available to anyone is supposed to act as a deterrent against most of such misbehavior as secrecy might succeed in concealing. Transparency, however, is also capable of breaking a sort of code of silence, which may exist amid employees of a given office or of another administrative body. Employees sharing workplace, indeed, are often inclined to perceive themselves as part of a homogeneous group, and may end up justifying mistakes made by their colleagues, or even covering-up their wrongdoing. They also tend to adopt a unique view with respect to legal or policy issues that present to themselves, with consequent frustration of any possibility for critical analysis and oversight of opinions and decisions. Such a multifaceted phenomenon has been studied from a psychological perspective and defined "groupthink." Janis, in particular, has described groupthink as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' striving for unanimity

[110] Id., at 328.

[111] Id., at 416.

[112] Id., at 417. For the action taken by Congress to give substance to the recommendations made by the 9/11 Commission, see the Implementation Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 110 Stat. 2731 (August 3, 2007).

override their motivation to realistically appraise alternative courses of action."[113] Department and agency personnel is not the only environment wherein groupthink may thrive. A tendency to groupthink, for instance, has been pinpointed in corporate boards and especially in their decision-making processes[114]. In such a sector, actually, study on the phenomenon seems to be somewhat advanced. Polarization and cascades have been conceptualized as negative effects produced by groupthink[115], and thus the three notions are related to one another[116].

Janis has studied how groupthink affected the dynamics of presidential decision-making process by creating a solid bond between the president and his advisors on occasion of some crucial events in twentieth century's U.S. history, such as the attack on Pearl Harbor, the Vietnam War, and the Watergate cover-up[117]. Overall, since a group tends to reason – and perhaps even to act – as a monolith, it is usually extremely difficult for its members not only to gain awareness of possible mistakes[118], but also to make objective assessment of the action taken[119]. As a result, there is almost no room left for oversight and critical review of business transacted by the group. It has been noted that if these are the main features and implications of groupthink, such a phenomenon has long manifested itself in the national

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[113] IRVING L. JANIS, *Victims of Groupthink*, 78 (Boston, 1978). See also ID., *Groupthink: Psychological Studies of Policy Decisions and Fiascoes*, 9 (2nd ed., MA, Boston: Houghton Mifflin, 1982).

[114] See MARLEEN O'CONNOR, *The Enron Board: The Perils of Groupthink*, 71 U. Cin. L. Rev. 1233 (2003).

[115] O'Connor has argued that polarization "refers to how group deliberation pushes a group, and its individual members, toward increased risk-taking." Id., at 1255. The Author instead has characterized a cascade as "a process whereby an entire group quickly comes to share a view, which may be false, because some people in the group appear to accept the belief." Id., at 1240. A cascade imply the production of a "snowballing effect," since it all starts with some members of a group supporting a position. Subsequently, other members of the same group join them in advocating such a position, which in the end turns out to be shared by the whole group. Id., at 1257.

[116] Ibid. (arguing that "groupthink encompasses the same ideas as polarizations and cascades […].")

[117] JANIS, *Victims of Groupthink*, supra note 113, at 25.

[118] Id., at 37 ("When groupthink tendencies become dominant, the members try to avoid saying anything that might disturb the smooth surface unanimity that enables the members to feel confident that their policies are correct and bound to succeed.")

[119] O'CONNOR, *The Enron Board*, supra note 114, at 1258 (maintaining that Janis' case studies on presidential decision-making process are aimed at "show[ing] how cohesive groups can make serious miscalculations about both the practical and moral consequences of their decisions.")

security domain[120]. A widespread culture of transparency is the only remedy against the tendency of groupthink to thriving.

C. The Universal Appeal of Secrecy: Secrecy at European Union Level

1. Negotiation of Treaties

Not only sovereign states, but also supranational organizations such as the European Union[121] need to rely upon a certain amount of secrets. About the very experience of the EU, it has been observed that "[s]ecrecy is universally appealing."[122] The European Union has authority to enter into international treaties and agreements[123], and the exercise of such an authority has grown in recent years[124]. Article 218 of the Treaty on the Functioning of the

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[120] See DEBORAH N. PEARLSTEIN, *National Intelligence and the Rule of Law*, 2 The Journal of the ACS Issue Group, 2, 11, 13 (2008) (contending that "U.S. national security history is replete with mistakes made by homogeneous groups, insulated from competing ideas or processes, moving forward without critically evaluating their own ideas of balancing tactical advantage against strategic goal.")

[121] See FRANCESCA BIGNAMI, *Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research*, 28 Am. U. Int'l. L. Rev. 1311, 1334 (2013) (characterizing the European Union as "the most highly developed supranational legal system in existence today.") See also GIACINTO DELLA CANANEA, *The European Union's Mixed Administrative Proceedings*, 68 Law & Contemporary Problems 197, 216 (2004) (arguing that the study of mixed administrative proceedings, which involve both the national and EU levels, is useful to grasp more clearly than the mere analysis of legislative procedures enables doing "the way in which public authorities act within the European legal order.")

[122] VIGJILENCA ABAZI et al., ACELG Workshop – *Secrecy and the European Union: A Democratic Perspective* (September 20, 2013), available at https://acelg.blogactiv.eu/2013/09/20/acelg-workshop-secrecy-and-the-european-union-a-democratic-perspective/.

[123] See, e.g., RAMSES A. WESSEL, *The EU as a party to international agreements: shared competences, mixed responsibilities*, in ALAN DASHWOOD – MARK MARESCAU (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 152 (Cambridge University Press, 2008) (arguing that EU international legal personality is to be inferred from Article 47 of the Treaty on European Union (TEU), as amended by the Lisbon Treaty, which recognizes legal personality to the European Union.) See also JULIJA BRSAKOSKA, *The Legal Personality of the EU, 2 Iustinianus Primus Law Review*, 1, 9 (2011) (contending that Article 47 TEU should be interpreted so as to encompass EU international legal capacity, although the Lisbon Treaty does not directly address EU international legal status). Had the Lisbon Treaty dealt with such a matter expressly – the Author continues – "the international identity of the Union would be clearer, more transparent and more visible to third countries, as well as its citizens." Ibid.

[124] See ELISA BARONCINI, *L'Unione Europea e la procedura di conclusione degli accordi internazionali dopo il Trattato di Lisbona*, 5 Cuadernos de Derecho Transnacional, 5, 6 (2013) (maintaining that the "widespread activity of the EU as treaty-maker" is evident today). See also

European Union (TFEU) sets out the general procedure for the conclusion of international agreements with third countries – i.e., countries outside the EU – and international organizations[125]. Under Article 218(2) TFEU, the Council of the European Union [hereinafter – Council] is empowered to authorize the commencement of negotiations on recommendations of the European Commission [hereinafter – "EC" or "Commission"], and to adopt negotiating directives. Furthermore, the Council is vested with the authority to conclude treaties and agreements, for the signing of which its assent is requisite. Pursuant to Article 218(3), the Council nominates "the Union negotiator," which is the Commission in most cases. However, when the agreement concerns "exclusively or principally" the common foreign and security policy (CFSP), it is the High Representative of the Union for Foreign Affairs and Security Policy that is in charge of negotiation. Therefore, consistently with the fact that the Commission turns out to be the "core executive"[126] in the European institutional architecture, it is also the EU main negotiator. As such, the Commission needs to resort to secrecy, which is traditionally the rule governing negotiation at international level[127]. The European Parliament [hereinafter – "EP" or "Parliament"][128], too, has a role in

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WESSEL, *The EU as a party to international agreements*, ibid. (highlighting "the increasing legal activity of the EU on the international plane.")

[125] Different procedures apply to specific subject matters – namely, the common commercial policy (Article 207 TFEU), and the monetary or foreign exchange regime (Article 219 TFEU).

[126] SIMON HIX, *The Political System of the European Union*, 32 (2nd ed., Basingsotke: Palgrave Macmillan, 2005). See also DEIRDRE CURTIN, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, 91 (Oxford University Press, Oxford and New York, 2009) (arguing that the Commission is commonly considered as the EU core executive for its functions "gel remarkably well with what can be described as the central executive tasks in any political system.")

[127] See AURÉLIAN COLSON, *The Ambassador Between Light and Shade: The Emergence of Secrecy as the Norm for International Negotiation*, 13 J. Int. Neg. 179 (2008) (arguing that the secrecy of negotiation gradually established itself as the general rule in international relations, especially after the Renaissance). See also DEIRDRE CURTIN, *Judging EU Secrecy*, Cahiers de Droit Européen 2012, 2 (December 3, 2012) p. 22 (maintaining that the "historical understanding of the diplomatic relationship among the negotiating parties" is based on secrecy, which traditionally features international relations).

[128] Even though the Lisbon Treaty assigned to the EP a more important role within the overall EU architecture than the one it played in the past, it may still not be deemed to equate to the national parliaments of the member states and – more generally – to a typical legislative assembly of a sovereign state. See ALINA KACZOROWSKA, *European Union Law*, 82 (3rd ed., London and New York: Routledge, 2013) (maintaining that "the EP, unlike national parliaments, is not a real, sovereign parliament as it has no power on its own to initiate and enact legislation or to impose taxes.")

EU international relations. Its consent, indeed, is required for the Council to conclude treaties and agreements in the subject matters enumerated in Article 218(6)(a)(i)-(v), which include such subject matters as apply the ordinary legislative procedure for the adoption of EU acts[129]. The EP is to be consulted in all other cases[130]. Furthermore, Article 218(10) TFEU entitles the EP to be "immediately and fully informed at all stages of the procedure [for the conclusion of treaties and agreements]." As a result, the secrecy that features negotiations conducted by the Commission on behalf of the EU at international level is limited by the wide right to know that EU primary law grants to the Parliament. It is quite clear that EU primary law allows for a good deal of flexibility in this regard, so that any disputes concerning access to information in the formation of treaties may be solved by the dynamics that the relations between the EC and the EP will assume in practice[131].

2. Interinstitutional Agreements

The EP and the EC entered into a framework agreement regulating their relations on October 20, 2010 [hereinafter – EP-EC Framework Agreement][132]. It is an interinstitutional agreement, as its purpose is to establish basic rules on the interactions between two EU institutions[133]. Point 24 of the EP-EC Framework Agreement requires that the Commission submit to the Parliament information concerning all the stages of the negotiation of international agreements "in sufficient time for [the Parliament] to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account." Furthermore, point 24 allows the Parliament to gain access to confidential information held by the Commission pursuant to Annex II to the EP-EC Framework Agreement. The stated purpose of Annex II, indeed, is to "govern the forwarding to Parliament and the handling of confidential information […] from the Commission in connection with the exercise of Parliament's prerogatives and competences."[134] Confidential

[129] Article 218(6)(a)(v) TFEU.

[130] Article 218(6)(b).

[131] It is not easy to detect in practice the degree of sensitive information that the EC agrees to share with the EP, as Curtain appears to suggest. See DEIRDRE CURTIN, *Secrecy regulation by the European Union inside out*, in DAVID COLE et al. (eds.), *Secrecy, National Security, and the Vindication of Constitutional Law*, 321 (Edward Elgar Publishing, 2013).

[132] Framework Agreement on relations between the European Parliament and the European Commission, October 20, 2010, OJ L 304 20.11.2010, p. 47.

[133] See BART DRIESSEN, *Interinstitutional conventions and institutional balance*, 33 E.L. Rev., 4, 550 (2008).

[134] Point 1.1, Annex II.

information as meant by the annex mainly includes the markings whereby European Union classified information (EUCI) is identified[135]. Under point 1.2.2 of Annex II, the different markings that may be assigned to EUCI depend on "varying degrees of prejudice," which the unauthorized disclosure of such material could cause to interests of the EU or of member states. Point 1.2.3 obliges the Commission to release the confidential information requested by "one of the parliamentary bodies or office-holders mentioned in point 1.4 [of the same annex]."

An interinstitutional agreement signed on November 20, 2002, instead, governs the Parliament's access to sensitive information held by the Council in the field of security and defense policy [hereinafter – EP-Council Agreement][136]. Point 1.1 of EP-Council Agreement clarifies that in such a context, sensitive information is meant as information that is classified, whether it originates from a member state, a third state, or an international organization, and regardless of the medium containing it and of "[its] state of completion." Overall, members of the Parliament (MEPs) are granted restricted access to such information, and the President of the Parliament plays a pivotal role in requesting the information to the Council and handling it after the material of interest has been disclosed. Point 3.1 provides that the President of the EP or the Chairman of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy [hereinafter – Committee] may request that the Committee be informed "on developments in European security and defence policy," and gain access to sensitive information. Furthermore, point 3.3, which appears to represent the core of the whole interinstitutional agreement, grants the President of the EP and a four-member special committee chaired by the Chairman of the Committee the right to be acquainted with sensitive information whenever access to such information is necessary for the EP to exercise its own powers in the field of security and defense policy. It is also provided that the President of the EP and the special committee are allowed to consult the released documents "on the premises of the Council." Point 3.3 of the EP-Council Agreement grants the President of the EP broad discretion in handling such sensitive information as has been disclosed by the Council. The President of the EP, in particular, is empowered to choose from some pre-established options for the sharing of such information

[135] Point 1.2.1, Annex II.

[136] Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, OJ C 298 30.11.2002, p. 1.

with the Parliament[137]. These options do not apply when the information at issue is classified as TOP SECRET. In June 2011, the EP adopted a decision that established principles, standards, and procedures for the handling of classified and other sensitive information at disposal of the Parliament itself[138].

3. Council Decision 2013/488/EU on Protection of EU Classified Information

In 2013, the Council adopted a decision on classified information [hereinafter – EUCI Council Decision][139] "lay[ing] down the basic principles and minimum standards of security for protecting EUCI."[140] Article 2(2) of EUCI Council Decision establishes four different categories of classified information, of which EU TOP SECRET and EU RESTRICTED lie at the two opposite poles of the scale of harm the dissemination of protected information and documents may bring about. EU TOP SECRET is a classification level that applies when the classifier determines that the unauthorized disclosure of certain information and documents "could cause exceptionally grave prejudice to the essential interests of the European Union or of one or more of the Member States."[141] Since the provision enumerates – and defines – the classification levels in descending order with respect to the seriousness of the threat they pose, EU RESTRICTED is the marking that comes last. In such a case, the threat proves so modest – if compared to the other categories – that it is considered capable of determining not sheer harm to interests of the EU or of member states, but mere disadvantages[142]. Furthermore, Article 2(3) of EUCI Council Decision allows that additional markings be applied to classified information in order to provide a more accurate description of the main features of the information, such as its origin and the specific field to which it pertains. Article 3(1) suggests that the classification of information has to comply with the principle of proportionality. This principle, actually, is typical of any classification system, insofar as it implies the legitimate demand that the sacrifice to the right to knowledge that stems from the classification of certain information not be excessive in consideration of the objective to achieve. The provision, indeed, prescribes that whatever the marking applied,

[137] Point 3.3(a)-(d), EP-Council Agreement.
[138] Decision of the Bureau of the European Parliament concerning the rules governing the treatment of confidential information by the European Parliament, OJ C 190 30.06.2011, p. 2.
[139] Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), OJ L 274 15.10.2013, p. 1.
[140] Article 1(1), EUCI Council Decision.
[141] Article 2(2)(a), EUCI Council Decision.
[142] Article 2(2)(d), EUCI Council Decision.

the information retain its classification level "for only as long as necessary." Under Article 3(2), a prior written consent of the state or authority that has created the information subject to classification is requisite for either the downgrading or declassification of such information, as well as for the modification or removal of additional markings. Finally, Article 9(1) of EUCI Council Decision clarifies that the management of classified information consists in "the application of administrative measures for controlling EUCI throughout its life-cycle […]." Such measures, indeed, cover the whole existence of classified information, from beginning – the creation and thus the application of a given marking – to end – declassification and even "destruction of EUCI."

II. Congress's Oversight Function over the Executive Branch

A. The Congressional Oversight Function: General Considerations

In addition to the people's right to know, the executive branch has to ensure wide access to information to Congress, which plays an important role in reducing the level of secrecy in the legal system by performing an oversight function over the executive branch. The oversight function, which is exercised especially by congressional committees through the conduction of inquiries and holding ad hoc hearings, is an integral part of the authority the Constitution bestows upon the legislative branch[143], as George Mason pointed out at the Convention of Philadelphia[144], where the Constitution was drafted in 1787. Congress's oversight power also extends to fields wherein the release of information calls for due caution, such as national security and foreign affairs. As to the former, actually, since the classification system shields a large amount of information from public access, the carrying out of inquiries and hearings is often the only way – unless leaks or whistleblowing occur – to shed some light into the activities of the executive branch, and to compel it to account for

[143] See MORTON ROSENBERG, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, CRS Report for Congress (August 21, 2008), p. 5 (observing that Congress power of inquiry traces back "to the establishment of the Constitution.")

[144] See MAX FARRAND (ed.), 2 *The Records of the Federal Convention of 1787* [hereinafter – *The Records of the Convention*], 199 (Yale University Press, New Haven, 1911) (statement of George Mason) (arguing that "the Legislature, besides *legislative*, is to have *inquisitorial* powers […].") (italics in original). Since the members of Congress are vested with the power to inquire into the executive branch and the whole administration – Mason observes – they "must meet frequently to inspect the Conduct of the public offices." Id., at 206.

its conduct. Pallitto and Weaver have contended that if Congress were to fail to inquire into the business transacted by the agencies belonging to the Intelligence Community and thus deliberately depend upon the information such agencies submit, Congress itself would end up being "completely at the mercy of the president and the executive bureaucracy."[145] By the same token, if Congress keeps a deferential approach in the domain of foreign affairs, the executive branch turns out to enjoy large discretion in deciding the amount of information to share. Especially if the event of congressional deference, leaks concerning such secret business or misbehaviors as a given whistleblower decides to divulge may be the only solution to overcome secrecy in this field. Schlesinger Jr. has mentioned the famous Jay Treaty and the annexation of Texas to the United States, which ensued to a negotiation with the Texas Republic, as examples of situations in which only "defiance [to the rules]," hence the leaking of information, made the executive business more transparent[146]. The Author points out that in such cases, as well as when the executive provides Congress with false information, "the rebellious collaboration between anonymous and disgusted officials and the press seemed the only means of getting the American democracy back into working equilibrium."[147]

The exercise of the power to inquire into the executive branch is inevitably intermittent, and thus features breaks of continuity. Congress, therefore, may not be expected to carry out investigations over the executive branch on a regular basis, as if it were a daily activity like the lawmaking one. Fuchs has observed that Congress "is not a useful institution for overseeing day-to-day matters" due to the restrictions on the "breadth, speed, and frequency with which it can perform oversight functions."[148] The exercise of the congressional power of inquiry – the Author continues – turns out to be "sporadic at best."[149] In like manner, Weaver and Pallitto have argued that because of the very discontinuity that characterizes such a power, courts are more efficient than Congress in bringing about exposure of agency misconduct. The latter, indeed, "cannot subject administrators to the

[145] PALLITTO – WEAVER, *Presidential Secrecy and the Law*, supra note 86, at 113.
[146] ARTHUR M. SCHLESINGER JR., *The Imperial Presidency*, 361 (Boston and New York, Mariner Books ed., 2004).
[147] Ibid.
[148] See MEREDITH FUCHS, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 150 (2006).
[149] Id., at 151.

level and frequency of scrutiny necessary to systematically discourage abuse."[150] Congress, however, have some means by which it may force executive branch officials to disclose the information it needs – namely, the power of issuing subpoenas aimed at obtaining the release of information and that of holding such officials in contempt. The simple threat of using either power often suffices to urge the executive branch to disclose the requested material, whether or not it is "convinced of the appropriateness of the information access request."[151] Furthermore, Devins has noted that congressional committees often succeed in acquiring the information they need by putting pressure on executive officials during their testimony in oversight hearings[152].

B. When Transparency Is Used For Personal Goals: Nixon's Posture in the Hiss-Chambers case

As strange as it may appear *prima facie*, a congressional inquiry conducted shortly after the end of World War II is of interest in a work on transparency for the implications that some intellectual effort and originality lead to infer from it. The inquiry was concerned with the Hiss-Chambers case, an espionage case, the meaning of which can be grasped only by taking into adequate consideration the fear of Communism that wrapped up the American politics and society especially in the early years of the Cold War. The case can be summed up as follows. During the summer of 1948, the House Un-American Activities Committee (HUAC), a specific congressional committee of the House of Representatives aimed at protecting the country from the Communism threat, embarked on an investigation involving – among others – Alger Hiss, a U.S. State Department high-ranking official. Especially in light of the testimony of Whittaker Chambers, a confessed former Communist agent, Hiss was accused of being a member of the U.S. Communist Party and of spying for the Soviet

[150] WILLIAM G. WEAVER – ROBERT M. PALLITTO, *State Secrets and Executive Power*, 120 Political Science Quart. 85, 89 (2005).

[151] NEAL DEVINS, *Congressional-Executive Information Access Disputes: A Modest Proposal – Do Nothing*, 48 Admin. L. Rev. 109, 134 (1996).

[152] Ibid. (arguing that when a committee of Congress is conducting an investigation and needs to gain access to certain executive branch information, "the hearing is the committee's chance to put a great deal of political and personal pressure on the witness," i.e., on the official who is required to disclose such information during his or her testimony).

Union at least until the late 1930s, when Chambers abjured Marxism[153]. Due to the lack of substantial evidence against Hiss, who categorically denied all accusations, the HUAC was about to let him off, but then-little known California Representative Richard Nixon strived to persuade the Committee to carry on with the inquiry. Hiss was tried twice, and found guilty of perjury in 1950[154], whereas the espionage indictment was foreclosed by statute limitations. Today, it is still controversial whether Hiss actually engaged in espionage for the Soviets[155].

However, two aspects of this whole affair really matter: the surprisingly high number of FBI records Representative Nixon had access to, and the Representative's posture, if compared with the one he kept with respect to the Watergate tape recordings more than twenty years later. As will be explained later, indeed, in the 1970s, President Nixon strived to cover up a series of White House conversations related to the Watergate scandal by claiming the existence of absolute executive privilege. On the contrary, Nixon's approach turned out to be clearly transparency-oriented in the Hiss-Chambers case. As far as this case

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[153] Chambers alleged that Hiss was a top-level member of the so-called Ware Group, "an underground organization of the United States Communist Party" operating in the 1930s. HOUSE UN-AMERICAN ACTIVITIES COMMITTEE, Testimony of Whittaker Chambers (August 3, 1948) (quoted in PHILIP ABBOTT, *States of Perfect Freedom: Autobiography and American Political Thought*, 94 (Massachussetts, 1987)).

[154] The District Court decision was affirmed on appeal (*United States v. Hiss*, 185 F.2d 822 (2nd Cir. 1950), while by denying a writ of certiorari the Supreme Court refused to review Hiss's perjury conviction (*Hiss v. United States*, 340 U.S. 948 (1951)).

[155] See, e.g., JAMES BARRON, *The Hiss Defense Doesn't Rest*, New York Times, August 16, 2001 (referring to a "growing consensus that Hiss […] had most likely been a Soviet agent."); JOHN E. HAYNES – HARVEY KLEHR, *Venona: Decoding Soviet Espionage in America*, 170 (New Haven, CT: Yale University Press, 1999) (addressing the matter as to whether the VENONA project, a program aimed at decrypting a shower of Soviet spies' telegrams, proved Hiss's involvement in espionage activities). The Authors advocate FBI Special Agent Robert Lamphere's assertion that the codename "ALES", come out of the VENONA cables, actually was used to identify Hiss. See also GORDON H. WENTWORTH, (Book Review) *Allen Weinstein, Perjury: The Hiss-Chambers Case*, 1 W. New Eng. L. Rev. 861, 861 (1979) (maintaining that Weinstein's book "so conclusively documents Hiss' guilt that there is no longer any doubt as to the justness of the jury's verdict.") But see also KAI BIRD – SVETLANA CHERVONNAYA, *The Mystery of Ales*, The American Scholar (Summer 2007) (arguing that even though evidence against Hiss does not appear to be "clear and definitive," many historians have followed the easy way of espousing Weinstein's arguments, characterized by a lot of details.) See also LAMAR WALDRON, *Watergate: The Hidden History*, 44-45 (Counterpoint, Berkeley, 2012) ("Even the release of the Hiss grand jury testimony, many of the VENONA cables, and other information emerging after the fall of the Soviet Union haven't provided a definitive answer. Experts on both sides can point to evidence of Hiss's guilt or innocence.")

is concerned, the FBI files document an intense exchange of information between FBI agents and Representative Nixon as the HUAC investigation was ongoing[156]. Indirect confirmation that Nixon depended mainly upon FBI records to build its leading role during the Hiss-related investigation may be found in the words used by Nixon himself. Indeed, during a speech he made at the House of Representatives on January 26, 1950,[157] just a few days after Hiss was convicted for perjury, Nixon complained about a presidential directive[158] that ordered all administrative agencies to refuse to release any information concerning the loyalty of executive branch employees to congressional committees[159]. Therefore – Nixon noted – the HUAC "had to conduct its investigation with no assistance whatever from the administrative branch of the Government, [and thereby the FBI] was unable to lend assistance to the committee."[160]

Yet, above all, the Hiss-Chambers Case displays Nixon's incoherence on transparency over the years[161]. In such a case, as a Congressman, he appeared to champion transparency as an absolute value. In the aforementioned speech of January 26, 1950, Nixon emphatically underlined his "solemn responsibility, both as a member of the Committee on Un-American Activities and as a member of [the House of Representatives to publicize] certain facts concerning the case which led to the trial and conviction of Alger Hiss for perjury […]."[162] He continued by noting that the Hiss-Chambers Case and its implications

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[156] See ATHAN G. THEOHARIS, *The Truman Presidency: The Origins of the Imperial Presidency and the National Security State*, 350-355 (Earl M. Coleman Enterprises, Inc., Publishers, New York, 1979).

[157] U.S. Congress, Cong. Rec., 81st Cong., 2nd Sess. (January 26, 1950) extract: pp. 999-1000; 1002-1006 (in THEOHARIS, id., at 355-360).

[158] Harry S. Truman, Directive on the Need for Maintaining the Confidential Status of Employee Loyalty Records (March 15, 1948), online by GERHARD PETERS – JOHN T. WOOLLEY, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=13128.

[159] THEOHARIS, *The Truman Presidency*, supra note 156, at 358.

[160] Ibid.

[161] For a connection between the Hiss-Chambers Case and President Nixon's invocation of absolute executive privilege to prevent disclosure of the Watergate tape-recordings and related documents, see LOUIS FISHER, *The Politics of Executive Privilege*, 229-230 (Carolina Academic Press, Durham, N.C., 2004); MARK J. ROZELL, *Executive Privilege, Presidential Power, Secrecy and Accountability*, 55 (2nd ed., Kansas, University Press, 2002) ("Although President Nixon is remembered for his unremitting defense of an absolute executive privilege power during Watergate, he did not always hold such a view."); LAURENT SACHAROFF, *Former Presidents and Executive Privilege*, 88 Tex. L. Rev. 301, 349 (2009).

[162] THEOHARIS, *The Truman Presidency*, supra note 156, at 355.

"involve[d] considerations which affect[ed] the very security of this Republic."[163] Furthermore, a White House tape contains the explicit admission of Nixon, while he was serving as President of the United States, that by leaking details on the case to the press he had provoked Hiss's conviction even before the evidence against Hiss was examined by the grand jury[164]. Beyond any doubt, neither the press nor congressional investigations are supposed to turn into weapons politicians may deploy to tear someone apart or to achieve other merely personal goals. Since Richard Nixon came out as the true winner in the Hiss-Chambers Case, which afforded him a degree of public visibility he certainly did not have before, it is possible to argue that in such a case, he exploited the value of transparency just to boost significantly his own political career. The discrepancy in his behavior is showed by the fact that with respect to the Watergate scandal, Nixon appeared to champion an opposite value – the value of executive branch secrecy.

Such discrepancy was brought up at the President's News Conference of March 15, 1973,[165] where the President was asked to explain why he based his conduct in the Hiss-Chambers Case on transparency, while he hampered the congressional investigation over the Watergate scandal by invoking the need for secrecy. The response of President Nixon turns out to be very interesting. He contended that the two cases were actually very dissimilar, because the Hiss-Chambers Case was concerned with espionage, while the Watergate affair was not. In the former, for the very reason that the HUAC "was investigating espionage against the Government of [the United States], that committee should have had complete cooperation from at least the executive branch of the Government in the form that [the HUAC] asked."[166] The Watergate scandal, instead, was not an espionage case, or if one deems it as such, it was concerned with a different type of espionage, one that not only was merely domestic and thus did not involve any relations with foreign countries or organizations, but also had a clear political nature: It was, as the President put it, "espionage by one political organization against another."[167] Therefore, Congress – Nixon concluded –

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[163] Ibid.

[164] WALDRON, *Watergate*, supra note 155, at 44 (quoting a statement of President Nixon recorded by a White House tape of July 1, 1971) ("We won the Hiss case in the papers. We did. I had to leak stuff all over the place […]. It was won in the papers […]. I leaked everything […]. I leaked out the testimony. I had Hiss convicted before he ever got to the grand jury.")

[165] *Richard Nixon: 1973: Containing the Public Messages, Speeches, and Statements of the President*, (Washington, D.C., Gov't Print. Off., 1975), p. 202.

[166] Id., at 211.

[167] Id., at 212.

"would have a far greater right and would be on much stronger ground to ask the Government to cooperate in a matter involving espionage against the Government than in a matter like [Watergate] involving politics."[168] President Nixon's argument was weak, since the essential purpose of the oversight power of Congress is to pinpoint any wrongdoing perpetrated within the executive branch or – in any event – imputable to it. Claiming that congressional committees should deliberately refrain from inquiring into sectors wherein executive branch officials somehow operate means raising the odds that such sectors be affected by misconduct.

If some sense may be found in the President's reasoning, it is probably related to the fact that espionage represents a traditional activity, the primary purpose of which is to tackle national security threats and prevent any harm to the country. This consideration, however, leads to argue that intelligence and other activities aimed at protecting the country may require some amount of secrecy. However, such a conclusion contrasts with the President's position: In the event of a true threat to the U.S. national security, the two political branches of government must ensure to each other the highest level of cooperation, and thus there should not be any room for executive secrecy. Furthermore, the fact that today, the concept of homeland security adds to the more old-fashioned concept of national security suggests that the whole picture of threats is more complicated and broader than it used to be in the past. However, one lesson may certainly be drawn from Nixon's incoherence: despite being essential to spotting misbehavior in the executive branch, congressional investigations way well be biased, especially if they underlie interests that are blatantly different from that in increasing transparency in the Federal Government.

C. Congress's Power of Inquiry Into the Executive Branch When There Is No Written Record Concerning a Given Decision

Congress may also exercise its power of inquiry to react to particular cases of presidential secrecy, namely when the president makes a decision that is not made public and not even put into writing. From a purely formal perspective, congressional oversight appears to be hindered by the fact that the legislative branch cannot gain access to documents tracking the whole presidential decision-making process, since some of those documents are missing. It is evident that in such cases, the role of hearings tends to become predominant,

[168] Ibid.

insofar as hearings are the most suitable means for fact-finding. In this regard, the Moynihan Commission Report provides an example pertaining to the domain of foreign affairs under the Clinton administration[169]. In 1994, President Clinton acquiesced to Iranian large-scale shipments of arms into Bosnia-Herzegovina via Croatia, but such a decision was not put into writing. Indeed, the Department of State – which is responsible for the United States' international relations, and therefore is equivalent to the ministry for foreign affairs in most countries worldwide – did not provide the involved ambassadors with written instructions as to how to handle the situation. In 1996, the Select Committee on Intelligence of the Senate inquired into the matter. Of particular interest is what then-Deputy Secretary of State Strobe Talbott uttered during his testimony before the Committee. He advocated the Department of State's conduct by stressing that when it comes to diplomatic relations and relevant internal deliberations, secrecy is often necessary for the protection of extremely sensitive matters. In addition, he stated that "[w]hat goes down on paper is more likely to come out in public, in inappropriate and harmful ways, harmful to the national interest."[170] Talbott was referring to the risk of leaks, which is favored by the existence of records[171].

The Senate Committee concluded its report by formulating some recommendations. Firstly, it is recommended that the Executive Branch – especially the White House and the Department of State – produce a written record of any significant decision in the field of foreign affairs, yet at the same time apply mechanisms aimed at ensuring that a proper level of secrecy be kept. Secondly, the Committee highlights that to be able to perform its institutional functions, it needs to receive constant information from the executive branch. In this regard, the Committee refers to section 501 of the National Security Act of 1947[172], currently codified at section 3091 of title 50, U.S. Code. According to Section 3091(a)(1), the President has to ensure that the congressional intelligence committees "are kept fully and currently informed of the intelligence activities of the United States […]." Subsection (d) requires that the two Houses of Congress adopt rules or resolutions setting forth "procedures to protect from unauthorized disclosure all classified information, and all information relating to intelligence sources and methods, that is furnished to the congressional

[169] See DANIEL P. MOYNIHAN, *Chairman's Foreword*, in Moynihan Commission Report, at xxxi.

[170] SENATE SELECT COMMITTEE ON INTELLIGENCE, *U.S. Actions Regarding Iranian and Other Arms Transfers to the Bosnian Army, 1994-1995*, 103rd Cong., 1st sess., 27 (1996).

[171] Assistant to the President for National Security Affairs Anthony Lake, too, mentioned in his testimony the potential for leaks that would have emerged had records been issued. Ibid.

[172] Pub. L. 80-253, 61 Stat. 495 (July 26, 1947). The act was originally codified at 50 U.S.C. § 401 et seqq.

intelligence committees or to Members of Congress […].” Furthermore, subsection (e) excludes that any portion of the act may be used to restrict Congress’s access to information concerning intelligence. Thirdly, the Senate Committee’s report contends that the executive branch should adequately acquaint Congress with any significant change in the foreign policy of the United States that has been made in secret.

D. The Full Access Doctrine

The full access doctrine is a theory, elaborated by Divoll, that argues that Congress is entitled to gain access to any information it needs to perform its oversight function, unless the requested information is reasonably deemed by the executive to be privileged, and thus may be withheld[173]. When policies are molded and actions are taken for the safety of the country – or at least it is stated that they are – Congress’s need to be apprised of the executive branch conduct proves even more compelling. Divoll refers in particular to “the aggressive intelligence programs” conducted under the Bush administration[174]. In more general terms, Divoll argues that in the national security domain, Congress’s right to know must be broad, albeit not so broad to entail “a complete cascade of information” flowing from the executive to the legislative branch[175]. Absolute transparency, without even recognizing to the Executive the prerogative to put off the release of information when it is proper to do so[176], would be – the Author argues – “disruptive and unwieldy,” for it could undermine the outcomes of intelligence activities and thus jeopardize human lives[177]. In this field, however,

[173] See VICKI DIVOLL, *The “Full Access Doctrine:” Congress’s Constitutional Entitlement to National Security Information from the Executive*, 34 Harv. J.L. & Pub. Pol’y 493, 541 (2011).

[174] Id., at 502. The Bush administration took on such programs as warrantless surveillance and extraordinary renditions of suspected terrorists in the aftermath of the 9/11 attacks.

[175] Id., at 503.

[176] See MARK J. ROZELL, *Executive Privilege. The Dilemma of Secrecy and Democratic Accountability* [hereinafter – *Executive Privilege. The Dilemma*], 5 (The Johns Hopkins University Press, Baltimore, 1994) (pointing out that the rift between critics and advocates of the withholding of information by the executive branch often extends to the timing of disclosure, since the former tend to demand immediate release of the requested information, while the latter strive to justify the postponement of the release).

[177] DIVOLL, *The “Full Access Doctrine,”* supra note 173, at 503. Even though Congress is entitled by the Constitution to gain access “to every type and piece of intelligence information” in possession of federal agencies operating in the field of national security – the Author contends – “[a] wise Congress will draw the proper line, and will not behave irrationally in its demands for information.” Ibid.

the withholding of information from Congress as it carries out investigations over the executive branch must be an exception to the rule.

In the domains of national security and foreign affairs, at least two main reasons – the Author observes – lead to advocate broad access to information by Congress. Firstly, the activities carried out by the agencies of the Intelligence Community are governed by a rule of secrecy, which finds its practical application in the system of classified information. By exercising its oversight function, Congress stands as a bulwark against misconduct and abuses the agencies operating in this field may be tempted to commit by turning the neutral concept of secrecy into that of concealment, usually meant with a negative acceptation. According to the Author, therefore, Congress and – namely – the committees on intelligence end up being the only overseers of the executive branch that American citizens may depend on to know how intelligence agencies operate on U.S. soil and abroad[178]. Secondly, broad access to national security information is necessary for Congress to make cognizant decisions on appropriations, and thus to pick programs and activities in this field that are worth funding. Such an argument is based on Article I, Section 9(7) Const., which vests Congress with the power of the purse, i.e., the power to establish in budget legislation the appropriations that provide all executive branch activities with funds[179]. Divoll, in particular, puts stress on Congress's need to gain access not only to records and documents on the content of activities and programs, but also to "detailed budget numbers" pertaining to federal agencies conducting business in the national security field, even though such numbers are usually "highly classified […]."[180] Congress, indeed, is unable to approve the funding of ongoing or new intelligence operations by formally inserting specific appropriation provisions in the annual budget legislation if it is not properly acquainted with "detailed information about the nature of the programs [performed or proposed by intelligence agencies] and their estimated cost."[181]

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[178] Id., at 502 ("[O]ur representatives in Congress are the only external (non-executive) means by which the intelligence policies and activities of the executive can be policed routinely. Congress performs a critical proxy function, unlike in any other area, requiring it to find out what the executive is doing (in the name of the American people) in its clandestine activities at home and overseas.")

[179] Article I, Section 9(7) Const. provides as follows: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

[180] DIVOLL, *The "Full Access Doctrine,"* supra note 173, at 506.

[181] Ibid.

Accordingly, the full access doctrine – Divoll maintains – leads to recognize the ability of Congress to obtain a great majority of the information held by agencies operating in the national security domain, even when such information are concerned with the gathering of foreign intelligence or the carrying out of covert action[182]. It is the committees on intelligence of the two Houses of Congress, not the executive branch, that must determine what information they need to perform their oversight function properly[183]. In general terms, federal agencies may not refuse to disclose information to Congress, since Congress's broad right to know is consistent with such flow of information from the executive to the legislative branch as the Constitution requires. The committees of Congress have a potentially unlimited right of access, because no information held by the whole apparatus of the executive branch – Divoll contends – "is beyond their legitimate grasp, and the Framers did not give the President any authority to resist [requests for information advanced by Congress]."[184] However, as already noted, Divoll observes that it would be inappropriate for Congress to gain access to any piece of information concerning intelligence activities. The full access doctrine advocates the existence of a right of access that turns out to be tendentially absolute. Yet, it does not require that Congress exercise this right to obtain the release of information that do not prove necessary for it to perform its constitutional functions, such as the details of a certain intelligence operation[185].

It has been observed that making the agencies of the Intelligence Community more transparent increases the risks of a distorted usage of disclosure in this field. The Executive, indeed, may prompt such agencies to alter reality and manipulate data when drafting reports or forming records. The publication of those reports and records are capable of steering the public opinion towards a given orientation. Rovner maintains that "greater transparency increases the likelihood of politicization and that published [intelligence] estimates will be

[182] Ibid. (pointing out that the very information concerning sources and methods of the gathering of intelligence abroad and the conduct of covert operations "often forms the basis of disputes between the [legislative and executive] branches over access.")

[183] Ibid.

[184] Id., at 506-507.

[185] Id., at 507 ("Although the Full Access Doctrine provides that Congress is entitled to it, only very rarely would Congress need to know, for example, the operational details of a Central Intelligence Agency (CIA) plan to capture a named al Qaeda leader next Tuesday at 1300 on a particular street corner in Khost, Afghanistan. Such information would not enhance the ability of Congress to perform its constitutional role […].")

biased."[186] He reaches the conclusion that such estimates should be governed by a rule of secrecy and thus kept as classified material, because "[t]he expectation that intelligence will be declassified creates incentives for policymakers to manipulate future assessments."[187] The full access doctrine mentioned above lacks an innovative value, as it does not add anything new to the debate over the extent of Congress's right of access to executive branch information. The limits such a doctrine pinpoints to congressional access to information stem from the application of a mere principle of common sense. It is rather evident, indeed, that such access must be weighted up with the supreme interests of the country, such as the protection of human lives and the safeguard of the integrity of the country itself, and may succumb to them on some occasions. The full access doctrine, however, deserves credit for the emphasis it puts on Congress's need to gain broad access to information in any field of executive branch activity, including intelligence and related business in the national security domain. Constant access to information pertaining to such domain by Congress is most likely to manage to prevent misuse of intelligence information, as with the case mentioned above of alteration of intelligence estimates for political purposes.

[186] JOSHUA ROVNER, *Fixing the Facts: National Security and the Politics of Intelligence*, 204 (Ithaca, NY: Cornell University Press, 2011). The Author mentions cases in which different U.S. administrations deployed intelligence documents misrepresenting facts and data to justify certain policies and gather the people's approval over them. Among those cases is the misuse of intelligence reports by President George W. Bush – as well as by U.K. Prime Minister Tony Blair – to provide some sort of legitimacy to the 2003 military campaign aimed at overthrowing Saddam Hussein's regime in Iraq. The distortion of reality in foreign intelligence gathering came as a response to the growing demand for information showing evidence of the weapons of mass destruction Saddam Hussein allegedly possessed. Fact-finding activities and relevant reports bent to the American and British governments' will. Rovner contends that "[t]he same democratic pressures that led to the publication of intelligence also led policymakers to manipulate estimates, ensuring that the results were biased and inaccurate." Ibid. The case got back into the spotlight in late 2015, when Blair avowed that "the use of misleading intelligence" led to the invasion of Iraq. NICHOLAS WATT, *Tony Blair makes qualified apology for Iraq war ahead of Chilcot report*, The Guardian (October 26, 2015).

[187] ROVNER, *Fixing the Facts*, id., at 203.

III. Concepts That Imply a Claim of Secrecy

A. National Security

1. The Compelling Interest in Protection of National Security

The Supreme Court has conceded for a long time that the Federal Government – namely, the executive branch – is entitled to be engaged in the protection of national security, which thus constitutes one of the legitimate objectives the Government constantly endeavors to achieve[188]. The Court has actually gone further, and regarded preserving the security of the nation as the most "compelling" of governmental interests[189]. In like manner, Rep. Larry Combest, as Vice Chairman of the Moynihan Commission, maintained that national security "is not simply one among many government concerns [but] the primary reason why [the U.S.] government is created."[190] Accordingly, the 2014 edition of one of the official documents the Executive issues on a periodic basis to set out strategies in the comprehensive field of national security and to assess implementation of policies thereupon – the quadrennial homeland security review[191] – stated that "[t]here is no more important function that a government can provide for its people than safety and security."[192] If national security is so important that it usually prevails in weighing up the conflicting interests a FOIA request (or a congressional request for information) may involve, it is likely that by invoking the

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[188] See *Haig v. Agee*, 453 U.S. 280, 305 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)) (holding that "the legitimacy of the objective of safeguarding our national security is 'obvious and unarguable.'")

[189] *Haig*, 453 U.S., at 307.

[190] Vice Chairman's Foreword, *Protecting National Security Secrets in a "Culture of Openness,"* in Moynihan Commission Report, at xlviii.

[191] The quadrennial homeland security review is provided for by section 707 of the Homeland Security Act of 2002, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007. This section is codified as section 347 of title 6, U.S. Code. Subsection (a)(2) characterizes the review as "a comprehensive examination of the homeland security strategy of the Nation," which the Secretary of Homeland Security has to conduct every four years. Subsection (b) identifies the content of the document more accurately. Firstly, the review has to establish an updated strategy for homeland security by ensuring that it be consistent with other strategy documents. Secondly, it has to pinpoint priorities among different missions in the domain of homeland security. Thirdly, it has to provide an account of interagency cooperation, as well as of infrastructure and policies "required to execute successfully the full range of missions" identified in the same document. Fourthly, the document is supposed to establish the amount of financial resources that is necessary for the accomplishment of homeland security missions. Fifthly, the review has to assess the organizational aspects of the Department of Homeland Security. Sixthly, the review is required to assess the acquisition and expenditure plans of the department.

[192] U.S. DEP'T OF HOMELAND SECURITY, *The 2014 Quadrennial Homeland Security Review* (June 18, 2014), p. 8.

need to protect national security the executive branch will obtain the effect of lawfully shielding requested information from access by the public (or Congress). By moving – implicitly – from such a consideration, Roberts has observed that national security tends to be regarded "as a trump card," and thus – metaphorically speaking – as a sort of spell to cast to impede disclosure of Government-held information whenever the supreme interest in safeguarding the country appears to be at stake[193].

2. The Concept of National Security

What is national security? Unfortunately, there is no unanimously accepted definition of the term, for two main reasons. Firstly, most scholars in different fields have failed to dig deep into the concept[194]. Secondly, it is impossible to establish a single, final definition, because the content of national security tends to vary over time, depending on the threats and concerns that are deemed to be primary in a given period. Accordingly, it has been observed that for the very reason that national security lacks stable, pre-fixed content, its scope ends up being too vague if not specified[195]. Positive law provides just a few leads in this regard. The executive order on classification of national security information currently effective, E.O. 13526 of 2009, as former executive orders on the same matters did, defines national security just by putting together the two sectors of national defense and foreign affairs. Under section 6.1(l) E.O., indeed, there exists damage to national security when unauthorized disclosure of classified information causes "harm to the national defense or foreign relations of the United States […]."

In the United States – like in most countries – national security was traditionally conceived of as inextricably related to the defense of the country against any attack, and thus

[193] ALASDAIR ROBERTS, *National Security and Open Government*, supra note 90, 70. See also LESTER R. BROWN, *Redefining National Security*, Worldwatch paper No. 14, 4a (Worldwatch Institute, Washington, D.C., October 1977) (also ID., *An Untraditional View of National Security*, in JOHN REICHART – STEVEN STURM (eds.), *American Defense Policy*, 21 (5th ed., Baltimore, 1982)) (arguing that national security has become "a commonplace expression, a concept regularly appealed to.")

[194] See JEREMY J. WALDRON, *Safety and Security*, 85 Neb. L. Rev. 454, 456 (2011) (arguing that law scholars and political scientists have seldom committed to "bring[ing] any sort of clarity to the concept [of national security].")

[195] See ARNOLD WOLFERS, *"National Security" As an Ambiguous Symbol*, 67 Pol. Sci. Quart. 481, 483 (1952) (contending that "if used without specifications [, the concept of national security] leaves room for more confusion than sound political counsel or scientific usage can afford.")

its scope tended to equate to that of the military domain[196]. National security has been defined as "the ability of a nation to protect its internal values from external threats."[197] Such a definition, however, is not satisfactory, since what has potential to jeopardize human lives and the stability of the country may be concerned just with the merely domestic environment. Therefore, the scope of national security must include not only external but also internal threats[198]. It has been observed that security – and thus national security – is usually "an instrumental value," as it is invoked "in order to enjoy the products or outcomes of some other value(s)."[199] Even when individuals or groups seem to be pursuing security as "an ultimate value" – it has been noted – they are in reality protecting "something else – the physical survival of themselves or of some collectivity […]."[200] The traditional coincidence between national security and defense of the country from external powers ensured by the military probably facilitated the widespread usage of such concepts as government secrecy and state secrets privilege[201]. The armed forces, indeed, have always relied upon a high level of secrecy, justified with the sensitive nature of most information and data they hold. In weighing up various interests related to requests for information, the interest of the military in keeping confidential the information they handle in performing their primary function – "the protection of citizens' physical security"[202] – tends to prevail over the interest in disclosure. In other words, the executive branch frequently denies access to military

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[196] See MAXWELL D. TAYLOR, *Precarious Security*, 3 (New York: Norton, 1976) (pointing out that national security was typically meant as "something having to do with the military defense of the country against a military enemy, and this is a responsibility primarily of the armed force.")

[197] MORTON BERKOWITZ – P.G. BOCK (eds.), *American National Security*, x (New York: Free Press, 1965).

[198] See IRA S. COHEN – ANDREW C. TUTTLE, *National Security Affairs: A Syllabus*, 1 (National Strategy Information Center, 1972).

[199] CHARLES F. HERMANN, *Defining National Security*, in *American Defense Policy*, supra note 193, at 19.

[200] Ibid.

[201] See Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 Yale L. J. 570, 576 (1982) (noting that throughout the first half of the twentieth century, the executive branch "claimed the [state secrets] privilege for military data only.")

[202] RICHARD SMOKE, *National Security Affairs*, in FRED I. GREENSTEIN – NELSON W.POLSBY (eds.), 8 *Handbook of Political Science*, 247 (Reading: Massachusetts, 1975). See also HOWARD BUCKNELL III, *Energy and the National Defense*, 2 (Lexington, Kentucky: The University Press of Kentucky, 1981) (observing that in addition to implying that certain basic human needs be met, the concept of physical security "comprises the security from violent domestic disturbances, invasion, or direct attack.")

information by claiming that disclosure to such information could jeopardize the safety of citizens or of the country. Bok has argued that the interest in "self-preservation [and in the] protection of everything of value in human lives" underpins military secrecy[203]. Such secrecy – the Author continues – may be invoked for the protection either of individuals as such or of individuals as part of a community. In the latter case, "collective secrecy" – as Bok has called it – justifies the withholding of information from access by the public, and is more frequently deployed than the other type of secrecy[204].

Today, it is unanimously conceded that national security concerns go well beyond the military domain. In the 1970s, Brown directed severe criticism at the "overwhelmingly military character" the concept of national security had assumed since World War II[205]. As a result – the Author noted – threats to national security other than the ones directly concerned with the military sphere tended to be overlooked[206]. Brown, however, was not the first to point out that purely military threats did not exhaust the range of concerns the Federal Government – namely, the executive branch – found itself dealing with[207]. Economic and environmental issues, for instance, have long been regarded as capable of endangering the security of the country as much as a direct aggression to the country itself[208]. Since various threats pinpointed as such require public money to be addressed, the Government is usually compelled to establish priorities among such threats, if not as to their importance, at least as to the amount of funding dedicated to them[209]. The Moynihan Commission Report also

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[203] BOK, *Secrecy: On the Ethics of Concealment and Revelation*, supra note 39, at 192.

[204] Ibid.

[205] BROWN, *Redefining National Security*, supra note 193, ibid. See also ROBERT S. MCNAMARA, *The Essence of Security: Reflections in Office*, 150 (New York: Harper & Row, 1968) ("[T]he trouble is that we have been lost in a semantic jungle for too long and have come to identify [national] security with exclusively military phenomena and most particularly with military hardware. It just isn't so.")

[206] BROWN, *Redefining National Security*, ibid. (maintaining that "considerations of military threats have become so dominant that other threats to the security of nations have often been ignored.")

[207] See, e.g., MCNAMARA, *The Essence of Security*, supra note 205; TAYLOR, *Precarious Security*, supra note 196, at 3-4.

[208] See, e.g., HERMANN, *Defining National Security*, supra note 199, at 20 (inserting inflation and "ecological disruptions" among a series of issues that are capable of "affect[ing] national security in multiple ways.")

[209] See also DAVID A. BALDWIN, *Security Studies and the End of the Cold War*, 48 World Politics 117, 128 (1995) (suggesting that it is for the government of a country to set priorities in tackling different threats to national security, since "[i]n a world of scarce resources, the goal of military security is always in conflict with other goals, such as economic welfare, environmental protection, and social welfare.")

pointed out that nowadays, the scope of national security unfolds much beyond the military sphere[210]. Those who are vested with the institutional duty to pinpoint and assess the threats that may endanger the United States – namely, the members of Congress, the President, and the heads of departments and agencies – "[have] to regard a broad range of matters as directly relevant to the country's security."[211]

3. The Hart-Rudman Commission and the New Threats to National Security After the End of the Cold War

In the United States, the end of the Cold War marked a watershed, as enabled a clearer perception of the threats posed to national security by issues not directly related to a military attack on the country. In 1998, Secretary of Defense William Cohen established a study commission, the United States Commission on National Security/21st Century, also known as the Hart-Rudman Commission or Hart-Rudman Task Force on Homeland Security [hereinafter – Hart-Rudman Commission], and assigned it the task to analyze the global environment that was developing after the end of the Cold War and to set forth recommendations for a national security strategy capable of coping with such new environment[212]. The Hart-Rudman Commission accomplished its tasks by following a three-phase process, and the reports it issued prove noteworthy – above all – for two reasons: firstly, they underlined that the set of threats to national security extended far beyond the military domain; secondly, the third and final report suggested strengthening the role and implementing structure of homeland security, a concept that gained momentum after September 11, 2001.

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[210] See Moynihan Commission Report, at 11 ("What seems clear is that, given the realities of modern government, with an increasingly complex relationship between matters of defense, foreign policy, and economic policy, and with the expansion of the subject areas considered important to the protection of U.S. national interests, the concept of national security now ranges well beyond the traditional military dimension alone.")

[211] Ibid.

[212] In particular, the Hart-Rudman Commission was entrusted with three tasks: to examine the international security environment existing at the time; to formulate a national security strategy for the United States suited for that environment, as resulting from the analysis conducted; to assess the administrative structure of national security within the Federal Executive in light of the new strategy, and "to recommend adjustments as necessary." CHARLES G. BOYD, *Preface*, in UNITED STATES COMMISSION ON NATIONAL SECURITY/21ST CENTURY, *New World Coming: American Security in the 21st Century. Major Themes and Implications*, Phase I report (September 15, 1999), p. v.

In its phase I report, released in 1999, the Hart-Rudman Commission outlined the main trends the first quarter of the twenty-first century would feature in the fields of science and technology, economy, politics and civilian society, as well as in the traditional military sector. It also pinpointed the main challenges the United States would have to face in that period, and observed that some of them, such as the proliferation of weapons of mass destruction, terrorism, and advances in information technology and biotechnologies pose potential threats to national security[213]. Furthermore, globalization of economy is deemed capable of affecting stability both at national and global levels[214]. Overall, the Hart-Rudman Commission found that without a doubt, in the twenty-first century, "major threats to national security [would] broaden beyond the purely military [domain]."[215]

The phase II report, instead, released on April 15, 2000, put forward proposals and suggestions for a new national strategy capable of tackling the international security environment that was taking shape. Such a strategy – the report states – "must find its anchor in U.S. national interests," which are grouped into three types: survival, critical, and significant interests[216]. Survival interests are defined as those interests that must be guaranteed at any cost, for otherwise "America would cease to exist as we know it."[217] These interests, therefore, embody the core of national security, as they imply the need to preserve the safety of the country. Furthermore, they require protection not only of the legal foundations of the country – the constitutional order of the United States – but also "of those core strengths – educational, industrial, and scientific-technological – that underlie America's political, economic, and military position in the world."[218] In a theoretical order of importance among the interests that it is a mission of the Federal Government – namely, of the executive branch – to pursue, critical interests rank second. They are aimed at ensuring public utilities and services – such as energy, communications, transportation, and healthcare – the provision of which proves essential to citizens' everyday life[219]. Finally, significant interests are mainly concerned with promotion of democracy, well-being, and economic

[213] See *New World Coming*, id., at 4.
[214] Id., at 4-5.
[215] Id., at 5.
[216] UNITED STATES COMMISSION ON NATIONAL SECURITY/21ST CENTURY, *Seeking a National Strategy: A Concert for Preserving Security and Promoting Freedom*, Phase II report (April 15, 2000), p. 7.
[217] Ibid.
[218] Ibid.
[219] Ibid.

growth outside the U.S. borders. This category of interests encompasses the interest that "neither mass murder nor gross violations of human rights" occur anywhere in the world[220]. It is quite evident that the content and underlying rationale of significant interests entail the risk that they come with a load of ideological considerations[221].

The final report prepared by the Hart-Rudman Commission, which came out in February 2001, turns out to be extremely interesting, as noted above, especially for putting emphasis on the concept of homeland security and for suggesting some major changes in the national security administrative apparatus. First of all, it is surprising that the report somehow envisioned what would occur on September 11, 2001, as it maintained that "[a] direct attack against American citizens *on American* soil is likely over the next quarter century."[222] The executive branch of the Federal Government, however – the report points out – is not equipped to address homeland security, since "[n]o adequate coordination mechanism exists" either among the numerous federal agencies competent in the homeland security domain or with levels of government other than the federal, which should be involved in the management of homeland security[223]. Overall, the executive branch is deemed "*very poorly organized to design and implement any comprehensive strategy to protect the homeland*."[224] In light of the threats stemming from the new international security environment, preservation of the American homeland – the report argues – "should be *the* primary national security mission of the U.S. government."[225] The Hart-Rudman

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[220] Id., at 8.

[221] The influence of ideology is substantially an inherent feature of the objective of promoting democracy, since such an objective needs filling with political content. See SUSAN D. HYDE, *The Pseudo-Democrat's Dilemma: Why Elections Monitoring Became an International Norm*, 103 (Cornell University Press, Ithaca: New York, 2011) (noting that since the Bush Senior Presidency, "the link between U.S. security and democracy promotion [has become] more overt […]."). On January 20, 2005, during his second-term Inaugural Address, President George W. Bush (Bush Jr.) stated that "it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world." Id., at 103-104 (statement of President George W. Bush). See also LEONARD WEINBERG, *The Islamic State and American National Security*, 10 Democracy and Security 335, 337 (2014) (arguing that the manifest failure of the project consisting in democracy promotion brings to conclude that "American and other western attempts to impose democracy by military means appears to have a boomerang effect.")

[222] UNITED STATES COMMISSION ON NATIONAL SECURITY/21ST CENTURY, *Road Map for National Security: Imperative for Change*, Phase III report (February 15, 2001), p. viii (italics in original).

[223] Id., at 7.

[224] Id., at 10 (italics in original).

[225] Ibid. (italics in original).

Commission, therefore, places homeland security at the heart of the national security strategy it proposes. Moreover, since the Federal Executive is considered to lack the necessary organizational structure to ensure efficiency in the management of homeland security and in the coordination of all involved entities, the Hart-Rudman Commission recommends the creation of a specific federal agency aimed at dealing with homeland security issues[226]. The report devises such an agency, a key component of which should be the Federal Emergency Management Agency, to bear responsibility "for planning, coordinating, and integrating various U.S. government activities involved in homeland security."[227] In addition to the functions vested in such an agency, the National Security Council is destined to play a strategic role in the framework of homeland security as conceived by the report. Congress, too, is included in the Hart-Rudman Commission's proposal, and its intervention is actually considered as a prerequisite for the reorganization of the whole administrative apparatus pertaining to homeland security. The report, indeed, recommends that Congress "*refurbish the legal foundation for homeland security in response to the new threat environment*."[228]

4. Terrorism and Cybersecurity

National security concerns tend to vary in subject and evolve in degree of intensity over time, as showed by the fact that terrorism is not perceived anymore as the most prominent threat to the security of the country, as it was – instead – in the aftermath of the 9/11 attacks on U.S. soil. It has been noted that the 9/11 attacks brought national security back at the forefront among the matters the President had to address, as was the case during the Cold War[229]. The two George W. Bush administrations engaged in an incessant war on terror, which raised a heated debate among constitutional and administrative law scholars over the proper compromise to reach between security and freedom without violating the Constitution[230]. Such a debate was stirred up above all by such Government policies as

[226] Id., at 15.

[227] Ibid.

[228] Id., at 27 (italics in original).

[229] See MARK HALPERIN – JOHN F. HARRIS, *The Way to Win: Taking the White House in 2008*, 398 (New York, 2008).

[230] Many scholars addressed such a compromise especially by analyzing the implications of the provisions of the USA PATROT Act of 2001 for the American legal system. See, e.g., DAVID COLE – JAMES X. DEMPSEY, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 147-187 (2nd ed., New York, The New Press, 2002); STEPHEN J. SCHULHOFER, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11* (New York : Century Foundation Press, 2002); HAROLD H. KOH, *The Spirit of the*

warrantless wiretapping and extraordinary renditions whose legitimacy has been strongly challenged. As the terrorism threat seemed to be fading away due to the weakening of Al Qaeda and of its satellite organizations, however, the self-proclaimed Islamic State sprang up in 2014, thereby posing new dangers to U.S. national security. It has been noted that the U.S. Government has an interest in hampering the emergence of a dominant power in the Middle East[231]. A scenario characterized by multiple states and authorities, indeed, will enable the United States to maintain an influence in that region, and as a result, the stakes of a direct attack on U.S. soil will wane[232].

Cybersecurity, the purpose of which – as the term suggests – is to protect a country from cyberattacks, i.e., attacks brought through information technologies, is a challenge the United States has faced in recent years. The 2014 Quadrennial Homeland Security Review pointed out that cybersecurity and the relative infrastructure "are vulnerable to a wide range of risk stemming from both physical and cyber threats and hazards."[233] This strategy document underscores that copying with cybersecurity proves highly burdensome for some reasons. First of all, cyberattacks may come from anywhere in the world, since only expertise in computer science is what it takes to perpetrate them, regardless of the exact location of the author. However, cyberspace is related to physical assets, which constitute the infrastructure of the cybersecurity system, and as a result, a major challenge consists "[in] reducing vulnerabilities and consequences in complex cyber networks."[234] The critical infrastructure implying the usage of information technologies is crucial to the efficient provision of basic services – such as energy, telecommunications, transportation, and financial services – and, accordingly, the Federal Executive is strongly committed to securing such infrastructure. This objective, which – the 2014 Quadrennial Homeland Security Review notes – is more complicated to achieve today than it was in the past because

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Laws, 43 Harv. Int'l L. J. 23 (2002); JULES LOBEL, *The War on Terrorism and Civil Liberties*, 63 U. Pitt. L. Rev. 767 (2002); *Patricia Mell, Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 Denv. U. L. Rev. 375 (2002); and with an emphasis on the need to assess the U.S. Government's reaction to 9/11 on the basis of emergency law, KIM L. SCHEPPELE, *Law in a Time of Emergency: Terrorism and States of Exception*, 6 U. Pa. J. Const. L. 1 (2004); BRUCE ACKERMAN, *The Emergency Constitution*, 113 Yale L. J. 1029 (2004). For an analysis of emergencies as a legal issue, see ALFREDO FIORITTO, *L'amministrazione dell'emergenza tra autorità e garanzie*, 17-50 (Bologna, 2008).

[231] See WEINBERG, *The Islamic State and American National Security*, supra note 221, at 341.

[232] Id., at 342.

[233] *The 2014 Quadrennial Homeland Security Review*, supra note 192, at 39.

[234] Ibid.

the critical infrastructure "is increasingly subject to sophisticated cyber intrusions that pose new risks," constitutes a major homeland security mission[235]. The accomplishment of such a mission calls for cooperation between various levels of government, as well as between public entities and the private sector. Even though the Department of Homeland Security (DHS) lies at the heart of the overall cybersecurity framework within the federal executive branch, the 2014 Quadrennial Homeland Security Review specifies that such a department is not entrusted with the whole responsibility, but other two departments are involved in the managing of cybersecurity: the Department of Justice and the Department of Defense[236]. Furthermore, it is stressed that the DHS performs its functions by following "a risk-informed approach," which takes into account all threats and hazards capable of jeopardizing the critical infrastructure of cybersecurity[237]. An executive order and some directives regulate such an approach[238]. The accomplishment of the mission to secure cybersecurity infrastructure in light of the threat posed by the Islamic State may prompt the executive branch to invoke secrecy in the interest of national security, thereby refusing to disclose certain information concerning the management of cybersecurity or the conduct of cyber operations against the Islamic State[239].

5. Leaks in the National Security Domain

a. The Regulation of Leaks in the Espionage Act of 1917 as Codified

A leak consists in the unauthorized disclosure of classified information outside the executive branch and namely to the press, so that such information can be published, and

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[235] Id., at 40.

[236] Id., at 40-41.

[237] Id., at 41.

[238] Id., at 42. The regulation of the approach the DHS is supposed to follow in tackling cybersecurity is found in the following sources: Executive Order 13,636 ("Improving Critical Infrastructure Cybersecurity"), February 12, 2013, 78 Fed. Reg. 11739 (February 19, 2013); Presidential Policy Directive/PPD – 21 ("Critical Infrastructure Security and Resilience"), February 12, 2013; NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY (NIST), *Framework for Improving Critical Infrastructure Cybersecurity* (February 12, 2014); DEP'T OF HOMELAND SECURITY, *The National Infrastructure Protection Plan (NIPP) -- NIPP 2013: Partnering for Critical Infrastructure Security and Resilience* (December 2013).

[239] See W.J. HENNIGAN, *Pentagon Wages Cyberwar Against Islamic State,* Los Angeles Times (February 29, 2016) (statement of Gen. Joseph F. Dunford Jr., chairman of the Joint Chiefs of Staff) ("We don't want the enemy to know when, where and how we're conducting cyberoperations […]. We don't want them to have information that allows them to adapt over time.")

thus become of public domain. The Espionage Act of 1917[240], codified at sections 792 et seqq. of Chapter 18 ("Espionage and Censorship"), U.S. Code, establishes punishment for all persons involved in the unauthorized disclosure of national security information subject to classification. On the one hand, the First Amendment of the Constitution guarantees both freedom of expression and freedom of the press. On the other hand, the unauthorized disclosure of classified information could reasonably endanger national security. Stone has argued that in such a conflict between supreme values, courts are called upon to determine whether "the value of the disclosure to informed public deliberation outweigh[s] its danger to the national security."[241] In particular, section 793 ("Gathering, transmitting or losing defense information") identifies the information the legal system protects by providing for a specific crime in a twofold manner. First of all, section 793(a), which targets the person unlawfully obtaining protected information, enumerates the objects in which information pertaining to national defense consists, and thus establishes the content of such information[242]. Subsections (d) and (e), instead, refer to the medium containing such information[243], and – respectively – target persons who have lawful or unlawful access to such information, and in either case deliver, transmit, or cause the transmission of the information to someone who is not entitled to obtaining it. All persons involved in leaking operations shall be punished if they are aware that such information "could be used to the injury of the United States or to the advantage of any foreign nation […]."[244] Furthermore, section 798 punishes the unlawful disclosure of classified information, and in such a case,

[240] Pub. L. 65-24, 40 Stat. 217 (June 15, 1917).

[241] GEOFFREY R. STONE, *Top Secret: When Our Government Keeps Us in the Dark*, 2 (Rowman & Littlefield Publishers, Lanham, Maryland, 2007).

[242] Among the specific objects of national defense information section 793(a) pinpoints is "information concerning any vessel, aircraft, work of defense, […] building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States […]."

[243] Subsections (d) and (e) applies to persons who – respectively – have lawful or unlawful access to and transmit or cause the transmission of "any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense […]."

[244] 18 U.S.C. § 793(d),(e). See MARY-ROSE PAPANDREA, *Balancing and the Unauthorized Disclosure of National Security Information: A Response to Mark Fenster's Disclosure Effects: WikiLeaks and Transparency*, 97 Iowa L. Rev. Bull. 94, 104 (2012) (noting that even though "this requirement might offer protection to well-meaning defendants who believed the disclosed information was important for the public to know, it does not require a court to balance the harm of disclosure against its benefits.")

too, it has to be ascertained that the author of the disclosure, i.e., "[w]hoever knowingly and willfully" communicates or otherwise makes available classified information to someone who is not entitled to receiving the release of such information, by transmitting or using such information brings harm "to the safety or interest of the United States or […] benefit of any foreign government to the detriment of the United States […]." For purposes thereof, section 798(b) defines classified information as "information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution." Not any classified information, however, triggers application of section 798, the scope of which, identified quite accurately in subsection (a)[245], is limited to cryptographic and communication intelligence information. Other sections in the U.S. Code, only some of which concern national defense information,[246] are devoted to leaks[247].

b. Whistleblowing

The concept of leak is closely related to that of whistleblowing. The latter, however, refers to situations in which agency employees disclose what they consider "unlawful secrets,"[248] and consequently, those employees need protection from any retaliation on their work position because of their decision to expose unlawful activities or practices. The Whistleblower Protection Act of 1989[249], as amended, provides for the general legal framework on whistleblowing, which is also addressed by sector federal statutes[250]. The effectiveness of all these statutes, however, has been questioned especially in the very domain of national security[251]. Pozen notes that while in general terms, such statutes ensure

[245] 18 U.S.C. § 798(a)(1)-(4).

[246] For a list of such provisions, see DAVID POZEN, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 523-524 (2013).

[247] Id., at 522 note 33 (pointing out that the term "leaks" is not found in federal provisions).

[248] STEPHEN I. VLADECK, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 Am. U.L. Rev. 1531, 1532 (2008).

[249] Pub. L. 101-12, 103 Stat. 16 (April 10, 1989), codified at 5 U.S.C. §§ 1201 et seqq.

[250] The Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (July 30, 2002), for instance, contains some provisions aimed at protecting whistleblowers in title VIII, also referred to as the Corporate and Criminal Fraud Accountability Act of 2002. In particular, section 806 of the act amended chapter 73 of title 18, U.S. Code, by inserting, after section 1514, section 1514A ("Civil action to protect against retaliation in fraud cases").

[251] See, generally, LOUIS FISHER, *National Security Whistleblowers*, CRS Report for Congress (December 30, 2005).

actual protection to departments' and agencies' employees who disclose alleged wrongdoing in the conduct of agency business to officials within the executive branch or to congressional committees[252], the same statutes "offer less succor when it comes to classified information," as in this field they turn out to be "confusing and user-unfriendly […]."[253] These statutes, indeed, do not provide whistleblowers in the national security domain with specific protection from such retaliation as may consist in revoking the security clearance, whose possession is requisite for access to classified information. In the fields of national security and foreign affairs, loss of one's security clearance – the Author points out – "generally means loss of one's job [, as well]."[254] If, on the one hand, federal legislation on whistleblowing is usually interpreted as defective towards those who – whatever their motivation – reveal classified information without being authorized to do so[255], it has been noted, on the other hand, that those who decide to leak national security information outside the executive branch tend to not deploy whistleblowing procedures[256].

c. WikiLeaks Disclosures and Their Implications

The unauthorized disclosure of classified information – especially when it is massive in amount, as with the case of WikiLeaks – tends to stir up public debate, which may also last a long time, but it is usually hard to pinpoint the actual impact of disseminating secret information on the legal system in general and on the national security domain in particular. WikiLeaks is a journalistic organization that has disclosed through online publication a huge

[252] Id., at 2 (noting that "[w]histleblower activity is often viewed as a struggle between the executive and legislative branches.")

[253] POZEN, *The Leaky Leviathan*, supra note 246, at 527. See also MARY-ROSE PAPANDREA, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 Ind. L. J. 233, 262-298 (2008); VLADECK, *The Espionage Act and National Security Whistleblowing*, supra note 248, at 1536-1537, 1542-1546.

[254] POZEN, *The Leaky Leviathan*, ibid.

[255] See VLADECK, *The Espionage Act and National Security Whistleblowing*, supra note 248, at 1534.

[256] See POZEN, *The Leaky Leviathan*, supra note 246, at 527 note 64 (referring to *Interview with Steven Aftergood*, Dir., Project on Government Secrecy, Federation of American Scientists, in Washington, D.C. (Apr. 10, 2012)) (reporting that secrecy expert Steven Aftergood pointed out that "most classified information leakers are either uninterested in availing themselves of the prescribed whistleblower channels or do not trust that they will prove safe or effective.") See also JACK GOLDSMITH, *Power And Constraint: The Accountable Presidency After 9/11*, 239 (New York: W. W. Norton and Company, 2012) (noting that after September 11, 2001, CIA employees who intended to expose wrongdoing and unlawful practices preferred to "lea[k] information to the press rather than follow internal whistle-blower procedures.")

number of secret documents and information about various national governments since 2006, but got into the spotlight – at least in the United States – especially in 2010 and 2011. In that period, indeed, WikiLeaks released thousands of documents concerning the conduct of the wars in Afghanistan and Iraq[257], and of diplomatic cables pertaining to U.S. embassies. Some major newspapers in the United States and Europe also published a good deal of such documents and information. However, what has been the impact of such ponderous dissemination of secret information? It has long been underlined the difficulty to identify how much the revelation of secret information to the public really affects policymaking in the United States[258]. Various scholars have detected the same difficulty with respect to WikiLeaks disclosures[259], which in any event stirred up public debate on the matters involved by such disclosures[260]. It is probably correct Papandrea's assertion that WikiLeaks

[257] See PATRICIA BELLIA, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 Yale L. J. 1448, 1451 (2012) (noting that the Afghan and Iraq War logs are "a collection of unedited raw materials, including first-hand incident and intelligence reports from military personnel on the ground.")

[258] See MARTIN LINKY, *Impact: How the Press Affects Federal Policymaking*, 187 (New York, 1986) (arguing that overall, the consequences of leaking secret information, which become of public domain, "is hard to discern and thereby even harder to predict.")

[259] See MARK FENSTER, *Disclosure's Effects: WikiLeaks and Transparency*, 97 Iowa L. Rev. 753, 758 (2012) (contending that the unauthorized release of classified military information and the revelation of diplomatic cables by WikiLeaks have produced effects which appear to be "relatively insubstantial in the U.S.," at least in the short term). Even though executive branch officials considered WikiLeaks disclosures to be capable of "caus[ing] untold, incalculable damage to the nation's military personnel, national security, and diplomatic efforts," no clear evidence of such a damage to the Federal Government – the Author observes – is detectable. Id., at 806. See also PAPANDREA, *Balancing and the Unauthorized Disclosure of National Security Information*, supra note 244, at 95 (2012) (agreeing with Fenster that it is extremely difficult to conduct a cost-benefit analysis of unauthorized disclosure of information pertaining to national security); CHRISTINA WELLS, *Contextualizing Disclosure's Effects: WikiLeaks, Balancing and the First Amendment*, 97 Iowa L. Rev. Bull. 51, 59 (2012) (arguing that it is "unclear" whether such harm to national security and diplomacy as envisioned by executive branch and NGO officials in the aftermath of WikiLeaks disclosures has come to fruition.")

[260] For an analysis of the impact of WikiLeaks disclosures on public opinion, see FENSTER, *Disclosure's Effects*, id., at 798-802. In this regard, the Author reaches a conclusion substantially not dissimilar from the one concerning disclosures on executive branch policymaking in the fields of national security and foreign affairs: In either case, the consequences of dissemination of classified documents boiled down to nothing or – at least – nothing evident. One might have expected some sort of popular movement aimed at holding the U.S. Government accountable towards citizenry for what WikiLeaks revealed about the conduct of the Afghan and Iraq wars, as well as about conversations and activities occurred at diplomatic level. However – Fenster observes – "there has been no significant or even discernible movement to change existing military engagements or foreign

"is notable not because the disclosures were all that harmful [to U.S. national security and foreign affairs,] but because government officials fear they are losing the ability to control classified information […]."[261] Edward Snowden's dissemination, occurred in 2013, of secret surveillance activities carried out by the National Security Agency[262] appears to have had a stronger impact on the executive branch of the Federal Government[263] and generated a broader public debate[264], even though this is a case where the concept of leak overlaps that of whisteblowing[265].

Furthermore, what appears to be somewhat interesting about the WikiLeaks affair is how disclosures occurred, and thus how WikiLeaks actually operates. In this regard, WikiLeaks has been compared to the Pentagon Papers, a set of documents setting forth U.S. foreign policy towards Vietnam[266], both by the press[267] and scholarship. The publication of

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policy in the period following the WikiLeaks disclosures, except in terms of tightening classified-information controls." Id., at 801.

[261] PAPANDREA, *Balancing and the Unauthorized Disclosure of National Security Information*, supra note 244, at 110.

[262] The Guardian began publishing NSA documents and classified information disclosed by Snowden on June 5, 2013, and so did other famous newspapers worldwide in subsequent months. Such documents and information got the people aware with the existence of NSA surveillance programs targeting both U.S. citizens and foreign nationals, especially leaders of foreign governments.

[263] See MICHAEL B. MUKASEY, Symposium Address – *Safe and Surveilled: Former U.S. Attorney General Michael B. Mukasey on the NSA, Wiretapping, and PRISM*, 3 Nat'l Sec. L. J. 196, 204-206 (2015) (explaining the potentially devastating impact of Snowden's illicit disclosures not only on ongoing military operations, but – more generally – on the domains of national security and foreign affairs).

[264] See JAMIL N. JAFFER – JEREMY RABKIN, *A Watershed Year in National Security Law, Preface to* 2 Nat'l Sec. L.J. 1, vii, vii (2013) (noting that Snowden's release of a huge amount of classified documents concerning NSA surveillance activities "ha[s] reenergized debate about the proper scope of government data collection on American citizens and stoked a new debate on government data collection against foreigners abroad.")

[265] When The Guardian began publishing the leaked documents, Snowden had just quit his job as analyst for a NSA contractor. As to the publication of documents pertaining to the wars in Afghanistan and Iraq, and of diplomatic cables, instead, WikiLeaks' internal source was Army intelligence analyst Chelsea (Bradley) Manning, who in August 2013, was sentenced to 35 years' imprisonment, as she was found guilty on multiple counts, including violations of the Espionage Act.

[266] The study formally titled "*United States – Vietnam Relations, 1945–1967: A Study Prepared by the Department of Defense*," better known as "the Pentagon Papers," was a collection of documents – classified "Top Secret" – aimed at analyzing the U.S. foreign policy towards Vietnam in the period 1945-1967. The study was commissioned by Secretary of Defense Robert McNamara in 1967, and completed in January 1969.

[267] See, e.g., PAUL FARHI – ELLEN NAKASHIMA, *Is WikiLeaks the Pentagon Papers, Part 2? Parallels, Differences, Exist*, The Washington Post (July 27, 2010); CHARLES HOMANS, *Alan*

such a leaked study, which President Nixon tried to impede[268], caused litigation that eventually got before the Supreme Court[269]. In their concurring opinions, Justices Black and Douglas set forth some interesting observations – respectively – on the concept of security[270] and on that of secrecy[271]. Scholars agree that between the Pentagon Papers and WikiLeaks

Dershowitz Joins Assange Legal Team: WikiLeaks Is "21st Century Pentagon Papers," Foreign Policy (February 15, 2011); ANNA MULRINE, *Pentagon Papers vs. WikiLeaks: Is Bradley Manning the New Ellsberg?*, The Christian Sci. Monitor (June 13, 2011).

[268] Daniel Ellsberg, a military analyst, was working with the RAND Corporation when he transmitted to the press copies of the Pentagon Papers, which he contributed to preparing. See ROY PELED, *WikiLeaks as a Transparency Hard-Case*, 97 Iowa L. Rev. Bull. 64, 70 (2012) (arguing that publication of the Pentagon Papers had much more serious impact on public opinion than WikiLeaks disclosures did, as the Pentagon Papers "revealed to the public information that dramatically departed from what was common knowledge at the time.") The New York Times began publishing portions of the Pentagon Papers on June 13, 1971, and so did the Washington Post afterwards. Attorney General John N. Mitchell and President Nixon required a federal court injunction aimed at forbidding those newspapers from publishing further excerpts from the Pentagon Papers. In the Government's view, national security and foreign relations of the United States would suffer grave and irreparable injuries if publication of the Pentagon Papers did not cease. The two newspapers, by contrast, claimed that upholding the Executive's request for restraint on publication would bring about unjustified suspension of their rights guaranteed by the First Amendment of the Constitution.

[269] See *New York Times Co. v. United States*, 403 U.S. 713 (1971). Such a decision addressed both the New York Times and the Washington Post cases by unifying the judicial proceedings, and affirmed the holdings rendered – respectively – by the District Court for the Southern District of New York, in the *New York Times* case, and by the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, in the *Washington Post* case. The Supreme Court underlined that prior restraints on exercise of the freedom of expression established by the First Amendment is subject to "a heavy presumption against its constitutional validity," and ruled that the U.S. Government failed to meet "[its] heavy burden of showing justification for the imposition of such a restraint." Id., at 714 (quoting – respectively -- *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963), and *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971)).

[270] Justice Black notes that the First Amendment to the U.S. Constitution of 1787 protects the press in order to enable it "[to] bare the secrets of government and inform the people." *New York Times,* 403 U.S., at 717 (Black, J., concurring). The Government claims that the President's role as Commander-in-Chief and its power to conduct foreign affairs underpin his authority to prohibit publication of information, the disclosure of which is considered to potentially jeopardize the security of the nation. However, the term "security," which is featured by intrinsic vagueness, may not be used – the Justice observes – "to abrogate the fundamental law embodied in the First Amendment." Id., at 719. National security actually is not ensured – Black continues – if "military and diplomatic secrets [are set] at the expense of informed representative government […]." Preservation of the security of the American Republic, therefore, requires that the three branches of the Federal Government protect the rights and freedoms provided for in the First Amendment. Ibid.

[271] Justice Douglas underscores that "[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information." Id., at 723-724

differences overcome analogies, and thus criteria used to analyze the former may not be applied to the latter[272]. In particular, a clear difference is concerned with the possibility to identify intermediaries, who winnow leaked material and determine what is worth publishing. This possibility existed without a doubt at the time of the Pentagon Papers, while – it has been observed – appears to be not so essential with respect to such an organization as WikiLeaks[273]. However, regardless of the more or less marked success in implementing the concept of transparency[274], all leaks have in common the effect of bringing information to light – and this effect may well bring about the dissolution of deep secrets – without resort to the Freedom of Information Act[275]. Since classified information is shielded from access by a specific exemption to freedom of information, leaks may be considered a means to bypass the FOIA.

(Douglas, J., concurring). He then suggests that government secrecy should be restricted as much as possible, since it "is fundamentally anti-democratic, perpetuating bureaucratic errors." Id., at 724. A principle of publicity must govern matters of general interest, on which indeed "there should be 'uninhibited, robust, and wide-open' debate." Ibid. (referring to *New York Times Co. v. Sullivan*, 376 U. S. 254, 269-270)).

[272] See BELLIA, *WikiLeaks and the Institutional Framework for National Security Disclosures*, supra note 257, at 1454 (pinpointing, in brief, the main issues that WikiLeaks' way of releasing secret documents raises as follows: "the challenge of controlling the secondary transmission of leaked information and the corresponding likelihood of 'unintermediated' disclosure by an insider; the risks of non-media intermediaries attempting to curtail such disclosures, as a response to government pressure or otherwise; and the pressing need to prevent and respond to leaks at the source.")

[273] See PAPANDREA, *Balancing and the Unauthorized Disclosure of National Security Information*, supra note 244, at 110 (arguing that prior to WikiLeaks, publication of classified or otherwise sensitive information required an identifiable intermediary, while "WikiLeaks and everything it represents – easy technology, disclosure outside the U.S. borders – raise the specter that these gate-keeping intermediaries making generally responsible publication decisions are no longer necessary.")

[274] See PELED, *WikiLeaks as a Transparency Hard-Case*, supra note 268, at 75 (arguing that "WikiLeaks and Data.gov have made it clear that simply dumping information in the public commons does not achieve transparency.")

[275] Id., at 73-74 (observing that WikiLeaks does not follow "the more traditional approach to transparency that developed through the implementation of FOIA.")

B. Homeland Security

1. The Concept of Homeland Security

In the aftermath of the terrorist attacks of September 11, 2001, a new policy concept[276] was inserted into the federal legal system – homeland security. As Morag has observed, homeland security "is a uniquely American concept."[277] Section 101(1) of title 6, U.S. Code, makes it clear that the terms "American homeland" and "homeland," whenever used in chapter 1 ("Homeland Security Organization") of this title – and, actually, in the U.S. Code in general – mean the United States of America. Since "homeland security" is peculiar to the United States, other countries usually do not adopt such a concept, and even if they do, the concept does not have abroad analogous implications to those, which feature the U.S. legal system[278]. As Friedman has maintained, while most states – especially the Western ones, i.e., those the United States is usually compared with, simply refer to national security and/or national defense, in the U.S., especially after September 11, 2001, "homeland" has been added to either traditional concepts, thereby forming the combined terms "homeland security" and "homeland defense." Such terms, besides, may not be used as synonyms, for – as I will try to explain later just by touching upon this matter – the former appears to have a broader scope. Notwithstanding such a distinction, the addition of "homeland" to concepts that may well stand and make sense even without it shows that there is a peculiar American way of meaning such concepts, a way that is almost impossible to replicate elsewhere, because – as noted above – it is deeply rooted in the American experience. If it is so, one may wonder what such an American way consists in. However, it is not easy to provide a clear answer, since the various entities within the executive branch operating in the domain of homeland security are entrusted with numerous, diverse missions and objectives. The enlargement of the administrative state after the 9/11 attacks on U.S. soil to address specifically homeland security shows how seriously the U.S. Government has since taken

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[276] See HAROLD C. RELYEA, *Homeland Security: The Concept and the Presidential Coordination Office – First Assessment*, 32 Presidential Stud. Quart. 397 (2002).

[277] See NADAV MORAG, *Does Homeland Security Exist Outside the United States?*, 7 Homeland Security Affairs 1, 1 (2011); ID., *Comparative Homeland Security: Global Lessons*, 1 (Hoboken, New Jersey: John Wiley & Sons ed., 2011).

[278] MORAG, *Does Homeland Security Exist Outside the United States?*, ibid. ("With the creation, in the United States, of homeland security as a policy framework and practitioner and academic discipline during the course of the first decade of the twenty-first century, other democracies took notice and some began to use the terminology of homeland security without, necessarily, understanding its scope or *raison d'être*.")

on its commitment to protecting the homeland. It is a serious commitment that the adoption of the concept of "homeland security" already implies. Friedman has gone so far as to argue – and I advocate his interpretation – that the addition of "homeland" to the word "security" indicates an excessive way of defining security[279]. What is excessive, however, is not only the definition of security, but also – and above all – the content of such a definition, which in turn indicates a sort of obsession for security.

There is not a unique definition of homeland security[280]. Actually, any attempt to pinpoint a single definition capable of applying to the whole activity carried out by the Federal Executive is doomed to failure, because since the 9/11 attacks, different strategic documents issued by the White House or the Department of Homeland Security have given homeland security different content[281]. By establishing a plurality of missions and objectives, indeed, those documents have molded the scope of homeland security in a different fashion. Originally, terrorism, i.e., the challenge to cope with the terrorism threat, constituted the core of homeland security. Even though the concept of homeland security already existed before September 11, 2001, the attacks on American soil prompted the U.S. Government to address homeland security at statutory level specifically, and to reorganize the structure of the Federal Executive to make it more rational and to improve the degree of coordination among different entities. The United States had undergone terrorism attacks before, but only those occurring on September 11, 2001 – as White has pointed out – turned homeland security "[into] a national priority."[282] The features of these attacks made them unique, as the 9/11 Commission report underscored[283], and thus led to a series of legislative and administrative measures aimed at addressing homeland security, and – mainly – at

[279] BENJAMIN H. FRIEDMAN, *Managing Fear: The Politics of Homeland Security*, 126 Pol. Sc. Quart., 77, 78 (2011) ("Only a nation that defines its security excessively needs to modify the word 'security' to describe defense of its territory.")

[280] See SHAWN REESE, *Defining Homeland Security: Analysis and Congressional Considerations*, CRS Report for Congress (January 8, 2013), p. 1 (observing that "[t]en years after the 9/11 terrorist attacks, policymakers continue to grapple with the definition of homeland security.")

[281] Id., at 8 (providing a scheme of different definitions of homeland security established by different official documents issued either by the White House or by the Department of Homeland Security in the period 2007-2012).

[282] RICHARD WHITE, *Towards a Unified Homeland Security Strategy: An Asset Vulnerability Model*, 10 Homeland Security Affairs 1, 10 (2014).

[283] See The 9/11 Commission Report, supra note 104, at 339 (characterizing the Al Qaeda attacks as "an event of surpassing disproportion.") Unlike the case with previous attacks – the report explained – the 9/11 attacks caused extraordinary damage to the United States in consideration of the extremely small group of people directly involved in them. Id., at 339-340.

countering the terrorism threat. The objective to tackle terrorism is still an essential component of homeland security. The current National Security Strategy, issued by the White House in February 2015, indeed, states that "[t]he threat of catastrophic attacks against our homeland by terrorists has diminished but still persists."[284] The scope of homeland security, however, gradually extended a lot beyond terrorism. By a few years after the 9/11 attacks, in part due to such events as the 2005 Hurricane Katrina, homeland security had included in its scope domestic catastrophic accidents and natural disasters[285]. In consideration of this expansion of the scope, White has argued that the primary purpose of homeland security should be identified as the purpose "to safeguard the United States from [any] domestic catastrophic attack."[286] According to the Author, indeed, such a formulation of the primary purpose of homeland security is neutral, since it does not discriminate between terrorism attacks and other catastrophic events, whatever the cause or motivation. Yet, there is more. Today, not only does homeland security aim to organize and managing the United States' reaction to natural disasters and other domestic accidents; it also addresses border and maritime security, as well as immigration[287]. Given the vastness the scope of homeland security has acquired over time, Reese has properly highlighted the importance of pinpointing priorities among diverse missions of homeland security[288], and such priorities are mainly established by the national security strategy[289].

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[284] THE WHITE HOUSE, *National Security Strategy* (February 2015), p. 9. The document concedes that this threat and the way of coping with it have changed a lot since 2001, but it is still crucial to putting considerable efforts at fighting terrorism. Id., at 9-10.

[285] See HOMELAND SECURITY COUNCIL, *National Strategy for Homeland Security* (October 2007), p. 10 (stating that homeland security is aimed at coping with – *inter alia* – both natural disasters, which "encompass a variety of meteorological and geological hazards," and "catastrophic domestic accidents involving industrial hazards and infrastructure failures.") As to the latter, they consist, for instance, in chemical spills, which may have a severe impact on public health and environment. Ibid. Furthermore, disasters caused by human activities include incidents capable of affecting the critical infrastructure of the United States, as was the case with the electrical power blackout known as the "Northeast Blackout of 2003." Id., at 11.

[286] WHITE, *Towards a Unified Homeland Security Strategy*, supra note 282, ibid.

[287] See REESE, *Defining Homeland Security*, supra note 280, at 2.

[288] Ibid. ("A clear prioritization of strategic missions would help focus and direct federal entities' homeland security activities.")

[289] See WHITE, *Towards a Unified Homeland Security Strategy*, supra note 282, ibid. (noting that the national security strategy issued by the White House "serves as a coordinating framework for federal agencies to prioritize resources and schedule activities to work towards common national goals.")

Homeland security is much broader than homeland defense, which is only one of its components. Relyea has observed that the concept of homeland security "appears to be rooted in past efforts at civil defense,"[290] and finds confirmation of this assumption in a 2001 address of President Bush[291]. Civil defense, which began to assume a stable framework only after the end of World War II[292], was traditionally deemed to embrace all the entities and activities aimed at preventing any damage to the United States and its citizens or at dampening the consequences of such damage[293]. At the dawn of the Cold War, indeed, the executive branch intended to establish "a permanent peacetime system of civil defense" characterized by flexibility, so that it could be "quickly and easily expanded to meet the exigencies of a given situation."[294] Therefore, what used to be included in the old concept of civil defense now constitutes an integral part of the scope of homeland security. The Department of Defense is responsible for ensuring the main objectives homeland defense requires to achieve – namely, "the protection of US sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats as directed by the President."[295] The scope of homeland security, as already noted, is broader than that of homeland defense, as the former puts together – above all – "law enforcement, disaster, immigration, and terrorism issues."[296] All levels of government, as well as the private sector, must participate in addressing such issues.

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[290] RELYEA, *Homeland Security: The Concept and the Presidential Coordination Office*, supra note 276, at 398.

[291] See Weekly Compilation of Presidential Documents, 37 (November 12, 2001), 1617 (statement of President George W. Bush) ("We will ask state and local officials to create a new modern civil defense service, similar to local volunteer fire departments, to respond to local emergencies when the manpower of governments is stretched thin.")

[292] RELYEA, *Homeland Security: The Concept and the Presidential Coordination Office*, supra note 276, at 398.

[293] See U.S. OFFICE OF CIVIL DEFENSE PLANNING, *Civil Defense for National Security*, 1 (Washington, D.C., U.S. Gov't Print. Off., 1948) (arguing that civil defense "is the mobilization, organization and direction of the civilian populace and necessary supporting agencies to minimize the effects of enemy action directed against people, communities, industrial plants, facilities and other installations – and to maintain or restore those facilities essential to civil life and to preserve the maximum civilian support of the war effort.")

[294] RUSSEL J. HOPLEY, *Letter of Transmittal*, in *Civil Defense for National Security*, id., at v.

[295] U.S. Dep't of Defense, *Homeland Defense*, Joint Publications 3-27 (Washington, D.C., 2007), p. vii.

[296] REESE, *Defining Homeland Security*, supra note 280, at 2.

2. Establishment of the Department of Homeland Security

The Homeland Security Act of 2002 established the Department of Homeland Security within the executive branch of the Federal Government. Section 111(b) of title 6, U.S. Code, identifies the mission of the department by conferring upon it a set of functions, ranging from sheer terrorism prevention to preservation of "the overall economic security of the United States," which the Department of Homeland Security has to ensure that "[be] not diminished by efforts, activities, and programs aimed at securing the homeland."[297] Under section 112, the President of the United States shall appoint, with the advice and consent of the Senate, a Secretary of Homeland Security[298], who is the head of the Department of Homeland Security, and as such exercises direction, management, and control powers over it[299]. The Secretary is entrusted with the authority to ensure coordination between all entities and persons involved in homeland security[300], and performs such authority by availing himself or herself of a specific office[301].

The creation of the Department of Homeland Security has been described as "the largest government reorganization in a half century," since this "colossal" department has combined functions formerly distributed among twenty-two federal agencies[302]. The magnitude of the reorganization, which has also been questioned as a way of facilitating the control over administrative structures[303], received criticism in Congress prior to the passage of the Homeland Security Act of 2002[304]. It has also been noted that initially, President Bush himself opposed the idea of establishing a new bureaucratic unit within the federal

[297] 6 U.S.C. § 111(b)(F).
[298] 6 U.S.C. § 112(a)(1).
[299] 6 U.S.C. § 112(a)(2).
[300] 6 U.S.C. § 112(c).
[301] The office subsection (c) refers to is the Office for State and Local Government Coordination, whose specific responsibilities are enumerated by section 361(b) of the same title – title 6, U.S. Code.
[302] DARA K. COHEN et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 Stan. L. Rev., 673, 676 (2006).
[303] Id., at 675 (arguing that "[t]he creation or reorganization of bureaucratic units – such as the new Department of Homeland Security (DHS) – remains among the least understood techniques for controlling bureaucracies.")
[304] See Cong. Rec., supra note 71, at S11034 (statement of Sen. Mark Dayton) ("I do not hear the American people clamoring for us to build a new, cumbersome, bureaucratic leviathan […]. While Americans cast their ballots, they may have had hopes for safer communities than protection from terrorism, but I sincerely doubt that they were voting to create a huge, new bureaucracy.")

administration[305]. The Department of Homeland Security was created to ensure centralization and coordination[306] in the gathering of sensitive information by the Federal Executive. Therefore, the establishment of the DHS responded to the need to provide some rationalization, on an organizational level, to the handling of information that is classified or sensitive in any event. Congressional debate shows that the members of Congress were aware that the Department of Homeland Security would handle a massive amount of classified information[307]. It has also been noted that all the pre-existing agencies brought into the DHS apparatus were assigned new statutory objectives and responsibilities. As a result, the new missions of such agencies added up to more traditional ones[308], and both of them had to be funded. However, the new homeland security missions were preferred from the outset in the allocation of resources[309]. Furthermore, Cohen, Cuéllar, and Weingast argue that since the President exercises immediate control over the DHS, its creation resulted in strengthening the Chief Executive's powers[310]. Such a consequence of the establishment of the Department of Homeland Security emerged in congressional debate[311].

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[305] COHEN et al., *Crisis Bureaucracy*, supra note 302, at 692 (setting out some underlying reasons that may have prompted the President to change his mind and champion the creation of the Department of Homeland Security).

[306] Id., at 718 (pointing out that "[t]he frequently stated rationale for creating the massive Department was coordination.")

[307] See 148 Cong. Rec. S11035 (November 14, 2002) (statement of Sen. Robert Byre) ("I understand this new Homeland Security Department will be wrestling with many issues of national security that should not be subjected to public disclosures rules.")

[308] COHEN et al., *Crisis Bureaucracy*, supra note 302, at 727 (underlining that some clashes may occur between the "legacy mandates [of those agencies and their] new homeland security mandates […].")

[309] Ibid. (contending that "the creation of DHS, coupled with an insistence on revenue neutrality, appears to have allowed Bush to transfer resources out of agency legacy mandates into new homeland security concerns.")

[310] Id., at 729 (maintaining that the Homeland Security Act of 2002 "allowed the President to select a cadre of political appointees to oversee twenty-two agencies lodged in a new bureaucracy with the daunting mission of protecting the homeland while continuing to carry out non-homeland security missions.")

[311] See 148 Cong. Rec. S8046 (September 3, 2002) (statement of Sen. Robert Byre) ("The President is clearly attempting to remove the limits on his power [in the homeland security domain,] and Congress is doing very little, up to this point, to restrain the administration's ambitions.") Sen. Byre also observed that conceding that the President should have the necessary leeway to cope with various homeland security concerns did not mean granting him "a blank check." Ibid.

3. The Withholding of Critical Infrastructure Information from Public Access

In addition to establishing the Department of Homeland Security, the Homeland Security Act of 2002 pinpointed a new category of information – critical infrastructure information – that is excluded from public access pursuant to the FOIA. Subtitle B, devoted to the regulation of the access to such information, has its own autonomy within the statute, and is called the Critical Infrastructure Information Act of 2002, codified at 6 U.S.C. 131 et seqq. Section 133(a)(1) establishes the subject to which the exemption from disclosure applies by referring to critical infrastructure information that is "voluntarily submitted" to the Department of Homeland Security, and expressly stated as such pursuant to paragraph (2). The denial of access is legitimate only if the information is used by the Department of Homeland Security not only to ensure the security of critical infrastructure, but also for "analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose [regarding critical infrastructure]." By identifying the FOIA as a legal basis, Section 133(a)(1)(A) vests the Department of Homeland Security with the authority to keep such information secret. This authority enters the scope of the FOIA through Exemption 3, which – as will be noted later – allows federal agencies to withhold information from public access by applying nondisclosure provisions contained in federal statutes other than the FOIA.

C. The Relation Between National Security and Homeland Security

1. A 2012 House of Representatives Subcommittee Hearing

What is the relation between the concepts of national security and homeland security? Do they coincide or not? Since neither national security nor homeland security has a single, pre-fixed definition, it is not easy to answer those questions. On February 3, 2012, the Subcommittee on Oversight, Investigations and Management – Committee on Homeland Security of the House of Representatives held a hearing[312] during which interesting observations were advanced in this regard. The main purpose of the hearing was to analyze the strategy documents issued by the White House and – especially – by the Department of Homeland Security, and to assess the implementation of such documents. In his opening statement, the Chairman of the subcommittee, Rep. Michael T. McCaul, notes that the DHS

[312] *Is DHS Effectively Implementing a Strategy to Counter Emerging Threats?* – Hearing Before the Subcommittee on Oversight, Investigations and Management – Committee on Homeland Security, U.S. House of Representatives, 112th Cong., 2nd Sess. (February 3, 2012) (Washington, D.C., U.S. Gov't Print. Off.).

is the third-largest department within the executive branch of the Federal Government as for number of employees and amount of funding[313]. He also points out that the DHS has met with severe criticism "for excessive bureaucracy, waste, ineffectiveness, and lack of transparency that have hindered its operations and wasted taxpayer dollars."[314] As already noted above, both the White House and the Department of Homeland Security issue periodically strategy documents on national security and homeland security[315] that establish multiple objectives and priorities, and set forth different definitions of the two concepts. McCaul argues that not only does such a plethora of strategy documents may bring about overlaps of their content; it also ends up hampering Congress in the exercise of its oversight function, and – above all – giving rise to confusion in DHS components, i.e., in the entities charged with accomplishing DHS missions[316]. He concludes that the DHS would need a single strategy document capable of embracing all diverse objectives and missions of the Department, such as to control the U.S. borders, to secure transportation, and to protect the President[317].

The added value of the hearing – hence, the reason as to why I am mentioning it – lies in various references that participants in the hearing made to the relation between the concepts of national security and homeland security. In particular, after Rep. Keating notes that the 2010 National Security Strategy is the first strategy document to include homeland security within the scope of national security[318], Caudle stresses the point that homeland security is by now an integral part of national security[319]. She refers to the Quadrennial Homeland Security Review Report[320] issued in February 2010, then superseded by a new

[313] Id., at 1 (Oral Statement of Hon. Michael T. McCaul) (noting that the DHS has more than 200,000 employees, and its annual budget amounts to more than 40 million dollars).

[314] Ibid.

[315] The main strategy documents are the following: the National Security Strategy; the National Strategy for Homeland Security; the National Strategy for Counterterrorism; The Quadrennial Homeland Security Review; the Bottom-Up Review. Ibid.

[316] Ibid.

[317] Id., at 2.

[318] Id., at 4 (Oral Statement of Rep. William R. Keating).

[319] Id., at 12 (Oral Statement of Sharon L. Caudle).

[320] Section 707 of the Homeland Security Act of 2002, as amended by the Implementation Recommendations of the 9/11 Commission Act of 2007, supra note (Pub. L. 110-53, 110 Stat. 2731 (August 3, 2007)) provides for the mandatory adoption of a quadrennial homeland security review report. Section 707 is now codified as section 347 of title 6, U.S. Code. Section 347(a)(2) defines such a document as "a comprehensive examination of the homeland security strategy of the Nation, including recommendations regarding the longterm strategy and priorities of the Nation for homeland

quadrennial report, issued in June 2014. The 2010 report – Caudle notes – underscores the importance of ensuring that all members of the homeland security community, also known as the homeland security enterprise, whatever the level of government – federal or local – or the legal nature – public or private – of the entity or person, be involved in accomplishing the missions and achieving the objectives of the DHS[321]. She also indirectly pinpoints government transparency as one of the means capable of preventing global shocks and thus contributing to tackling threats to national security[322].

Above all, during the hearing, Caudle is asked whether she detects any marked differences between the 2010 National Security Strategy and the two issued by former President George W. Bush[323]. She recalls once again that the 2010 National Security Strategy is the first to put "emphasis on placing homeland security within National Security."[324] She deems such a choice to be wise, since homeland security "does not stop at the [U.S.] borders." The scope of homeland security, as gradually broadened since 2001, ends up overlapping in part with the traditional domains of national security and foreign affairs. However, such overlapping – Caudle contends – is not an alarming issue, for "what we do overseas internationally, [as well as] what we do with our defense establishments […,] has

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security and guidance on the programs, assets, capabilities, budget, policies, and authorities of the [DHS]."

[321] *Is DHS Effectively Implementing a Strategy to Counter Emerging Threats?*, supra note 312, at 14 ("As was the case with earlier policies, the [2010] Report called for a National framework of collective efforts and shared responsibilities to build and sustain critical homeland security capabilities.")

[322] Caudle points out that the Federal Emergency Management Agency (FEMA) grasped the essential role of drivers of future change to preventing global shocks and thus to addressing national security properly. Id., at 20 (referring to FEMA, *Crisis Response and Disaster Resilience 2020: Forging Strategic Action in an Age of Uncertainty*. Office of Policy and Program Analysis (January 2010)). According to the FEMA report, among such drivers is "*Universal Access and Use of Information*," notably favored by the Internet and related technological innovations. Id., at 7 (italics in original). Tools developed in the Information Age result in increasing public participation in decision-making, as they "empower the public to play a greater role [than the one they could play in the past] in identifying 'what matters' and producing content themselves." Public information official repositories, i.e., administered by the Federal Government, realize the beneficial function to steer individuals, i.e., public information users, through an ocean of material freely available online. The report argues that "[p]ublic access to 'raw' data sources, such as *Data.gov* expands the possibilities of how existing information can be used, and increases expectations of government transparency." Ibid (emphasis added).

[323] Under the George W. Bush Presidency, the White House issued two national security strategies – respectively – on September 17, 2002, and on March 16, 2006.

[324] *Is DHS Effectively Implementing a Strategy to Counter Emerging Threats?*, supra note 312, at 28.

implications for homeland security."[325] The multiple homeland security missions identified by the 2010 National Security Strategy go well beyond the prevention of terrorism. They are also aimed, indeed, at coping with natural disasters, accidents caused by human activities, and any other event or situation capable of jeopardizing the ordinary functioning of the Federal Government. Therefore, the scope of homeland security now embraces – Caudle notes – "all of the threats and hazards or drivers of those threats and hazards that are important [to the United States]."[326]

2. A Possible Distinction Between National Security and Homeland Security

The conclusion I draw from this dissertation over the concepts of national security and homeland security is that the only possible distinction between them rests on the purely domestic or international scope of the threats considered. In this sense, homeland security includes all threats and hazards that turn out to be only domestic, i.e., that exhaust their effects within the U.S. soil. Accordingly, the threats that instead exceed the borders of the United States – thus, threats that operate on a global scale or, in any event, have international implications – fall within national security. To put it differently, whenever foreign intelligence gathering or other operations conducted abroad by agencies of the Intelligence Community are involved, the more traditional concept of national security applies.

Such a reconstruction is consistent with what Morag, for instance, has maintained about the concept of homeland security. The Author, indeed, defines homeland security as a product not only "of American geographic isolation [, but also of] the strong tendency throughout American history to believe that there was a clear divide between events, issues, and problems outside US borders and those inside US borders."[327] Before the concept of homeland security was recognized at statutory level and specific structures within the executive branch of the Federal Government were created to address homeland security – Morag observes – the U.S. legal system and its institutional framework were suited to cope with international threats, but not also with purely domestic threats. Instruments tailored to threats concerning only the American territory, i.e., threats that did not involve U.S. foreign affairs, were missing. Therefore, the Federal Government created a structure and began adopting policies concerning homeland security "to fill this void between what the US could

[325] Ibid.

[326] Id., at 31.

[327] MORAG, *Does Homeland Security Exist Outside the United States?*, supra note 277, ibid.

do overseas and what it was unable to do domestically."[328] Such a distinction between national security and homeland security probably lays itself open to critics because of the theoretical approach it is based upon. However, it is the only distinction that two concepts featured by such fluctuating content – as I tried to explain – appear to indicate.

D. Executive Privilege and Its Heterogeneous Content

The term "executive privilege" has a plurality of contents, whose essence is the ability of the executive branch to refuse the release of certain information it holds. Kinkopf has emphasized the vagueness of the concept, because of the multiple forms into which it can turn[329]. The various acceptations of the concept have in common the purpose of invoking executive privilege to withhold executive branch information from a branch of the Federal Government other than the Executive or from the public in general. The main meaning of executive privilege is based on a narrow interpretation, according to which the privilege may be used to prevent Congress from gaining access to executive branch information. This meaning implies a demand for information that Congress advances usually when exercising its power to inquire into the executive branch. An extensive interpretation, instead, refers to the ability of the Executive to withhold information not only from the other two branches of the Federal Government – the legislative and judicial ones – but also from the general public, i.e., from any person, whether an individual, an association, or an enterprise. Pursuant to this much broader interpretation, executive privilege features a twofold scope. The first one pertains to national security and foreign affairs, two fields that invocation of the privilege is aimed at protecting, whereas the other scope is concerned with the free exchange of opinions within the executive branch. The latter is deemed to encompass the so-called presidential communications privilege. Rozell has defined such a privilege as "the right of the President and high-level executive branch officers to withhold information from those who have compulsory power – Congress and the courts (and therefore, ultimately, the public)."[330]

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[328] Ibid.

[329] See NEIL KINKOPF, *Executive Privilege: The Clinton Administration in the Courts*, 8 Wm. & Mary Bill Rts. J. 631, 631-632 (2000) (arguing that executive privilege "is remarkably protean [, as] it can assume a seemingly limitless array of forms and, consequently, is difficult to grasp.")

[330] MARK J. ROZELL, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 Duke L. J. 403, 404 (2002).

If executive privilege is meant in a broad sense, it can be divided into different categories depending on the person or entity appealing to the privilege. If it is a federal department or agency that invokes the privilege, two exemptions to the Freedom of Information Act may be applied, either separately or jointly. The FOIA exemptions will be analyzed later[331]. Here, I limit myself to pointing out that Exemption 1 protects information concerning national security and foreign affairs, while Exemption 5 allows the withholding of material, whose disclosure would impede the frank exchange of ideas within an agency or between two or more agencies. Even though Exemptions 1 and 5 may be simultaneously called upon to deny access to certain information, they follow their own standards and have a different impact on freedom of information. It has been observed that "[t]he right to disclosure differs markedly with the two classifications."[332] However, according to the most widespread acceptation of the privilege, it is the Chief Executive that raises a claim of executive privilege to refuse the release of information to Congress, when it is conducting an inquiry into the executive branch, or to a federal court or another authority having judicial functions, as was the case with the denial of access to a special prosecutor who had requested access to some White House conversation in United States v. Nixon[333]. As Kitrosser has noted, indeed, U.S. presidents tend to claim "[the existence] of a constitutional right to withhold information from Congress, the courts, or persons or agencies empowered by Congress to seek information."[334] The two souls of executive privilege are both legitimate: the President may resort to the privilege "to protect, first, certain national security needs, and second, the confidentiality of White House deliberations when it is in the public interest to do so."[335]

It is also important to stress that executive departments and agencies may not call upon the FOIA exemptions to prevent the legislative branch from gaining access to information held by those departments and agencies. Section 552(d) of title 5 of the U.S. Code, indeed, provides that the FOIA "is not authority to withhold information from Congress." Therefore, the FOIA expressly excludes legislative-executive disputes concerning access to information from its own scope. Furthermore, in a 1990 decision, *Dow*

[331] See infra, Chapter 3, Part II.

[332] PETER L. STRAUSS et al., *Gellhorn and Byse's Administrative Law. Cases and Comments*, 501 (11th ed., University Casebook, 2011).

[333] See infra, Chapter 3, Part I.

[334] KITROSSER, *Secrecy and Separated Powers*, supra note 65, at 492.

[335] ROZELL, *Executive Privilege Revived?*, supra note 330, ibid.

Jones & Co. v. Dep't of Justice[336], the D.C. Circuit held that Exemption 5 may not be deployed to shield from public access information the executive branch has submitted to Congress. The exemption – the Court argues – is intended to cover the exchange of ideas either within an agency or between agencies of the executive branch, but does not extend to the flow of communications between the legislative and executive branches. Under no circumstances may Congress be considered an agency under the FOIA. Therefore, communications between the former and a federal agency are not tantamount to such inter-agency memoranda or letters as Exemption 5 refers to, and thus do not fall within the scope of this FOIA exemption 5[337].

[336] 917 F. 2d 571 (D.C. Cir. 1990).

[337] Id., at 575.

CHAPTER 2

TRANSPARENCY AND SECRECY IN THE LEGISLATIVE AND JUDICIAL BRANCHES OF THE FEDERAL GOVERNMENT

I. Transparency and Secrecy in Congress

A. The Reference to Secrecy in the U.S. Constitution

As regards recognition of the authority to withhold information from public access and to conduct secret business, the U.S. Constitution shows a paradox. In the United States, government secrecy is usually meant as a set of prerogatives and privileges that are vested – either expressly or implicitly – in the executive branch, not in Congress. Other than the Freedom of Information Act, whose nine exemptions result in restricting access to federal agencies' records, it has always been acknowledged – almost unanimously – the existence of executive privilege, a long-standing institution the Executive may appeal to in order to shield its business from public scrutiny, above all from congressional investigations. While executive privilege is not provided for in the Constitution, secrecy in Congress finds formal recognition in the written text, namely in Article I, Section 5, Clause 3[338]. Firstly, this provision bestows regulatory autonomy on the two houses of Congress by empowering them to set their own rules of procedure. The scope of each House's power to regulate its proceedings is extremely broad, and subject only to basic limitations. As the Supreme Court stated as early as 1892, provided that the Constitution is observed and there is no violation of fundamental rights, "all matters of method are open to the determination of the [two] House[s]."[339] The power is also inexhaustible, and thus it can be exercised innumerable times without ceasing to exist[340]. Secondly – and above all – Article I, Section 5, Clause 3, Const. prescribes that each House "keep a Journal of its Proceedings, and from time to time publish

[338] See DAKOTA S. RUDESILL, *Coming to Terms with Secret Law*, 7 Harv. Nat. Sec. J. Secret Law 241, 254 (2016) (underscoring that such a Clause is "the Constitution's sole textual reference to secrecy […].")

[339] *United states v. Ballin*, 144 U.S. 1, 5 (1892).

[340] Id. (arguing that the two Houses power to establish rules of proceedings "[is] always subject to be exercised by the House[s], and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal"). Id.

the same, excepting such Parts as may in their Judgment require Secrecy […]."[341] Even though the House and Senate journals were envisioned by the Founding Fathers as the official means to report on business carried out within Congress[342], the Congressional Record has been "more widely known, referred to, and used"[343] since its establishment in the late nineteenth century. The former have a more restricted content, as they do not encompass any transcription of floor debates[344]. Both the House of Representatives and

[341] For a discussion about this clause, see ADRIAN VERMEULE, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361, 410–22 (2004).

[342] MILDRED L. AMER, *The* Congressional Record*; Content, History and Issues*, CRS Report for Congress (January 14, 1993) p. 2 (noting that the Framers bore in mind the experience of the Constitutional Convention, where secrecy was the rule, with only journals reporting its proceedings). Relyea mentions an episode occurred during the Constitutional Convention of 1787, in which James Wilson of Pennsylvania, dealing with a proposal to grant each chamber of the federal Congress discretion in determining what parts of its journal should be published, stated: "The people have the right to know what their Agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings." HAROLD C. RELYEA, *Congress as Publisher: Politics, Institutions, and Policy*, 29 Gov't Inform. Quart. 291, 291 (2012) (drawing upon M. Farrand (ed.), The Records of the Federal Convention of 1787, 260 (New Heaven, CT: Yale University Press, 1937)).

[343] AMER, *The* Congressional Record, id., at 1.

[344] The journals include presidential communications, Congress's voting, the legislative history of statutes, and procedural matters. They mainly consist in "minute books or summaries of the floor proceedings published after each session of the Congress is completed." ROBERT C. BYRD, *Reporters of Debate and the Congressional Record,* in ID., 2 *The Senate, 1789-1989*, 311-312 (Washington, D.C., U.S. Gov't Print. Off., 1991). The House and Senate journals, therefore, may be defined as "the minutes […] of the business transacted by each house [of Congress]." AUGUST IMHOLTZ, JR., *Congress as Publisher: The Magic of the U.S. Congressional Serial Set*, 29 Gov't Inform. Quart. 285, 285 (2012). The journals used to be published in the United States Congressional Serial Set, also known simply as the Serial Set, which consists in "[a] massive compilation of printed publications of the U.S. House of Representatives and the U.S. Senate." It published congressional materials as of the First Session of Fifteenth Congress (1817). Congressional business carried out before the Fifteenth Congress, instead, is documented in the American State Papers. The name U.S. Congressional Serial Set, which actually was officially adopted only in 1981 after several names had followed one another over time, derives from the structure of the collection. It is divided into volumes, within which materials are arranged by class of publication, and such an arrangement is repeated for each (annual) session of each Congress. All volumes are applied "the serial, or sequential, numbering [which begins] with Serial Set Volume number 1 in the 15th Congress […]." Id. The U.S. Congressional Serial Set published the House and Senate journals from the 15th Congress (1817) through the Eighty-second Congress (1952), and has ever since contained reports and documents prepared by or submitted to the two Houses. Reports consist in studies or communications – the latter's aim is to express the official standpoint of a given congressional body – that committees (or subcommittees) submit to the House or the Senate. The main category of committee reports is given by legislative reports, which "far outnumber the other types of Reports in

Senate rules of proceedings allow of closed-door meetings and regulate the access to the relevant records.

B. The Congressional Record: History, Regulation, and Structure

The Congressional Record came up as the final stage of a tortuous history concerning the publication of legislative branch business. No sooner had the First Congress begun to work, than the House of Representatives opened its doors to the public, and reporters were allowed to report unofficially floor debates, which were thus divulged on newspapers. It has been pointed out that those early accounts were not impartial, but rather biased by the opinions of the newspapers' editors[345]. Unlike the House of Representatives, the Senate held secret meetings until 1794[346], and, nevertheless, excerpts from Senate journals were at times published in newspapers. By the beginning of the nineteenth century, the National Intelligencer – a Washington, D.C. newspaper - had been publishing reports – albeit, rather inaccurate[347] - on congressional proceedings[348]. The newspaper owner was Samuel Smith, who later sold it to Joseph Gales. Gales and William Seaton, both stenographic reporters, were officially assigned the position of Congress printers in 1819. The Register of Debates, which they published 1824 through 1837, consisted in a set of abstracts of such floor debates as the editors deemed worthy of reporting. The accounts of congressional proceedings

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the Serial Set […]." Id., at 286. Somewhat marginal room in the Serial Set is devoted to the class known as "documents", whose items "[are] less directly tied to legislative functions than the Reports." Id. This class, indeed, mainly includes executive branch material.

[345] AMER, *The* Congressional Record, supra note 342, ibid.

[346] The House of Representatives and the Senate granted reporters access to congressional debates and proceedings – respectively – as of April 8, 1789, and December 9, 1795. See DAVID BLEISCH, *The Congressional Record and the First Amendment: Accuracy is the Best Policy*, 12 Boston. C. Envtl. Aff. L. Rev. 341, 344 note 14 (1985) (drawing upon ELISABETH G. MCPHERSON, *Reporting the Debates of Congress*, 28 Q.J. of Speech, 141, 144 (1942)). The Senate Historian's Office states that "[t]he framers of the Constitution assumed that the Senate would follow their own practice, as well as that of the Congressional Congress, of meeting in secret." See http://www.senate.gov/artandhistory/history/minute/The_Senate_Opens_Its_Doors.htm (quoted in CHRISTOPHER M. DAVIS, *Secret Sessions of the House and Senate: Authority, Confidentiality, and Frequency*, CRS Report for Congress (December 30, 2014), p. 3 note 11).

[347] AMER, *The* Congressional Record, supra note 342, at 3.

[348] The National Intelligencer "published its notes on the [congressional] debates, which other newspapers around the country then clipped and reprinted." BYRD, *Reporters of Debate and Congressional Records*, supra note 344, at 312-313 (quoted in AMER, *The* Congressional Record, ibid.).

published in the Register of Debates were more complete than those contained in the National Intelligencer. After ceasing to be Congress printers, Gales and Seaton embarked on a brand new project in the period 1833-34. They began publishing the Annals of Congress, which were aimed at reconstructing abstracts of past congressional proceedings by drawing on many diverse sources[349]. However, in the same period, the Congressional Globe began publishing reports on congressional business, as well, and its accuracy in the transcription of debates improved considerably over time.

As of 1850, reporting on congressional activities was gradually institutionalized, with Congress directly providing the Congressional Globe's editors with copies of debates[350]. As Amer has noted, "[t]his semiofficial plan marks the beginning of so-called 'verbatim' reporting in Congress."[351] However, the time was not ripe yet for a verbatim account of congressional proceedings, which indeed was quickly overcome by a new policy of the Congressional Globe, based on a selection of debates worthy of publication[352]. Then, a three-phase process led Congress to sanction the daily publication of the Congressional Record. On June 23, 1860, Congressional Joint Resolution 25[353] established the Government Printing Office (GPO), whose current name is Government Publishing Office[354], as a federal printing

[349] The Annals of Congress's scope stretched from the First to the Eighteenth Congress, First Session, thus it did not extend beyond 1824.

[350] In the period 1848-1850, Congress entered into contracts by which independent reporters and newspapers' editors were financed to record congressional debates and deliver a copy of them to the Congressional Globe's editors. See BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 345. This operation was supposed to ensure a good level of accuracy of the debates printed in the Congressional Globe.

[351] AMER, *The* Congressional Record, supra note 342, at 5.

[352] In 1851, the Congressional Globe's editors stated that from then onward, verbatim reporting of debates would be restricted to speeches and remarks deemed to be of primary importance by congressmen. As far as the remainder of congressional debates, the Congressional Globe would provide just a summary. See BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 345.

[353] 12 Stat. 117.

[354] See Pub. L. 113-235, div. H, title I, §1301 (a),(b), Dec. 16, 2014, 128 Stat. 2537 (December 16, 2014). In particular, division H of the statute, which contains the Legislative Branch Appropriations Act of 2015, addressed the issue of the name of the Government Printing Office. Subsection (a) of Section 1301 of the act established the change of name from Government Printing Office to Government Publishing Office, and subsection (b) prescribed that from then on, the new name should be considered as replacing the old one anywhere it was found in the law and official papers. Both these subsections are codified at as a note preceding section 301 of title 44, U.S. Code. Furthermore, subsection (c) substituted the term ''Director of the Government Publishing Office'' for "Public Printer" anywhere the latter term appeared in title 44, U.S. Code. Section 301 provides that the

agency within Congress's administrative structure. In 1865, Congress prescribed that the Congressional Globe be published daily[355]. On March 3, 1873, Congress entrusted the Government Printing Office with the function of officially publishing debates and activities of the two Houses[356]. The Congressional Record, which replaced the Congressional Globe, constituted "the official congressional gazette"[357] all along. It was first published on March 5, 1873[358], and has been relied upon ever since as the official source for disseminating Congress proceedings and debates.

Chapter 9 of Title 44, U.S. Code, deals with the Congressional Record. Most of its content is tantamount to the codification of the Printing Act of 1895[359], which still sets forth "much of the basic policy" on the matter[360]. Section 901 obliges the Joint Committee on Printing[361], which is entrusted with an oversight function over "the arrangement and style of the Congressional Record," to ensure that the Congressional Record be "substantially a verbatim report of [congressional] proceedings." It is also required that "all needed action for the reduction of unnecessary bulk" be taken. The Congressional Record has to be endowed with semimonthly and session indexes[362]. They are prepared by the Government Publishing Office, which is also charged with the printing and distribution of the Congressional Record, "as directed by the Joint Committee on Printing."[363] The responsibility for the different activities regarding the Congressional record is split between Congress – namely, the Joint Committee on Printing – and the GPO: A control function over

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Director of the Government Publishing Office be appointed by the President "by and with the advice and consent of the Senate."

[355] 13 Stat. 460 (1865).

[356] 17 Stat. 510 (1873).

[357] HAROLD C. RELYEA, *The Exercise of Congressional Legislative Power in Service to the Informing Function*, CRS Report for Congress (May 22, 1996), p. 4, in *Public Access to Government Information in the 21st Century* – Hearings before the Committee on Rules and Administration, U.S. Senate, 104th Cong., 2nd Sess. (1996), p. 311.

[358] The first issue was devoted to a special session that the Senate held on the previous day – March 4, 1873.

[359] 28 Stat. 601 (January 12, 1895).

[360] RELYEA, *The Exercise of Congressional Legislative Power*, supra note 357, ibid.

[361] The Joint Committee on Printing has an equal composition of representatives and senators. Under section 101 of Title 44, U.S. Code, indeed, the Joint Committee on Printing consists of the chairperson and four members of the Committee on Rules and Administration of the Senate and the chairperson and four members of the Committee on House Oversight of the House of Representatives.

[362] 44 U.S.C. § 902.

[363] Section 903.

the content, revision, and reporting is vested in the former, while the latter is responsible for the printing, binding, and distribution of the Congressional Record[364]. Section 903 specifies that the Congressional Record, which is issued daily, is to bear the date "of the actual day's proceedings reported." The Joint Committee on Printing has also to ensure that the daily edition of the Congressional Record include information concerning congressional committee meetings and hearings, as well as "a brief resume of congressional activities for the previous day […]."[365] The information on congressional committees that is found in the daily Congressional Record boils down to details about place and subject matter of committee meetings and hearings, and to the mentioning of reports submitted to the Houses. Therefore, the Congressional Record encompasses no verbatim account of congressional business carried out within committees.

The daily edition of the Congressional Record consists of four sections: the proceedings of the House of Representatives and those of the Senate; the Extensions of Remarks; the Daily Digest. The Congressional Record provides an account of what happened in Congress the previous day, i.e., the day before the issuing of the gazette. Other than the daily edition of the Congressional Record, there is a permanent edition, whose content and structure are somewhat different. The sections devoted to the proceedings of the two Houses, actually, include communications from the executive branch and a good deal of heterogeneous material bearing on legislation passed or just introduced. Furthermore – and above all – the report of floor debates turns out to be not as accurate as the term "verbatim" used in Section 901 would suggest. Not only are members of both Houses allowed to edit the transcript of their remarks before they are published in the Congressional Record; Representatives are also authorized to extend their oral remarks, and Senators – in like manner – are granted permission to conclude speeches when they were cut off on the floor. Further remarks and material not related to ongoing legislative proceedings, too, may be inserted in the Congressional Record, provided that certain size restrictions are observed. The section concerning the Extensions of Remarks, previously known as the Appendix, includes all material that does not directly bears on floor activities. This section, therefore, may be composed of the following contents: remarks meant as prosecution of speeches that members of Congress could not conclude on the floor due to time limits; the transcript – either verbatim or edited – of speeches delivered or remarks made entirely out of Congress;

[364] AMER, *The* Congressional Record, supra note 342, at 6.
[365] 44 U.S.C. § 905.

the text of letters Representatives or Senators send or receive from constituents; the printing – *rectius*, the posting, when the operation is performed electronically – of newspaper articles. A list of scheduled committee and subcommittee meetings, too, is usually placed in this section. The last portion of the daily edition of the Congressional Record is the Daily Digest, established by the Legislative Reorganization Act of 1946 (also known as the Congressional Reorganization Act)[366]. Its content is tantamount to "a concise and convenient account" of business conducted by congressional committees and subcommittees[367]. The final section of the Congressional Record, therefore, sheds some light on committee and subcommittee meetings and hearings, as well as on further activities they carry out.

C. Television Coverage of Congressional Proceedings

Television coverage of congressional proceedings began on a regular basis only in the 1970s, at the end of a long-standing resistance by the members of Congress. Television had already entered Congress previously, but only on sporadic occasions[368]. Not surprisingly, significant improvements in this regard occurred in the Seventies, "a time of heightened public interest in 'sunshine in government' and legislative-executive clashes over the Vietnam War."[369] The Legislative Reorganization Act of 1970[370] addressed both the openness of committee meetings and hearings[371] and the broadcasting of committee hearings. Section 116(a) provides for the possibility of radio or television broadcast of such committee hearings as the public is allowed to attend. Paragraph (b) amends rule XI of the Rules of the House of Representatives especially by setting out the two main objectives the broadcasting of committee hearings is directed at achieving.

These objectives reveal the need to render the business carried out in Congress – namely, in the House of Representatives – more intelligible. The first of such objectives somehow evokes the metaphor of sunshine mentioned above, as it expressly considers TV

[366] Pub. L. 79-601, 60 Stat. 812 (August 2, 1946), especially section 221.
[367] AMER, *The* Congressional Record, supra note 342, at 9.
[368] The opening day of the 80th Congress (1947-1949) at the House of Representatives was subject to TV coverage. Just a few other committee hearings of the House and Senate were televised in the following two decades. See WALTER J. OLESZECK, *Congress and the Internet: Highlights*, CRS Report for Congress (August 29, 2007), p. 5.
[369] Id.
[370] Pub. L. 91-510, 84 Stat. 1140 (October 26, 1970).
[371] Respectively, sections 103 and 112, Legislative Reorganization Act of 1970.

coverage of committee hearings as instrumental to "the education, enlightment, and information of the general public […]." The second objective, too, is targeted at the public. The broadcasting of committee hearings, indeed, may significantly contribute to the comprehension by citizens of the role of the House of Representatives within the Federal Government. Such objectives are still found in the Rules of the House[372]. Furthermore, reference is made to "such written rules" as each congressional committee may adopt to regulate radio or television coverage, as well as photography, of hearings that are accessible to the public. In the Seventies, an increasing demand for TV coverage of floor debates also arose in Congress[373]. Eventually, the House decided to broadcast its floor debates in 1979, while the Senate adopted an equivalent TV coverage system only in 1986.

D. Secret Sessions of the House of Representatives and the Senate

The two houses of Congress have at times met in secret, albeit not simultaneously, as secret sessions have been more frequent in the Senate than in the House of Representatives. It has been noted that Congress's secret sessions enjoy "the blessing of the Constitution's Journal Clause" mentioned above[374]. As far as the House is concerned, the rate of secret meetings was higher in the early decades of the American Republic. Other than the secret sessions that were held during the War of 1812 against Britain "mainly to receive confidential communications from the President,"[375] the House convened secret meetings in 1825 and in 1830. Since then, closed-door sessions have taken place only four times: in 1979, 1980, 1983, and 2008[376]. On all these occasions, the issues to discuss in secret either fell within the domains of foreign affairs and national security or regarded purely military

[372] Rule XI(4)(a) of the Rules of the House of Representatives. See infra.

[373] Top staff aide to the House subcommittee on broadcasting Donald Wolfensberger noted that the demand for TV coverage of floor proceedings came out mainly to offset President Nixon's unique position at the forefront of the political scene. He stated: "What gave impetus to televising House floor debates was the recognition by the Democratic leadership in early 1970 that President Richard Nixon was dominating the airwaves with defenses of his Vietnam War policies, while congressional opponents were not being given equal access by the networks." DON WOLFENSBERGER, *20 Years of House TV: A Bipartisan Reform for a Partisan Era?*, Roll Call, March 18, 1999, 6 (quoted in OLESZECK, *Congress and the Internet*, supra note 368, ibid.).

[374] RUDESILL, *Coming to Terms with Secret Law*, supra note 338, ibid.

[375] DAVIS, *Secret Sessions of the House and Senate*, supra note 346, at 3.

[376] Ibid.

operations[377]. As noted above, senators always gathered in secret until 1794, but the practice of holding closed-door meetings remained quite an appealing option even subsequently. Executive sessions of the Senate – i.e., the sessions devoted to nominations of Federal Government's officials and treaties – featured confidentiality until 1929[378]. Data show that the Senate has held 57 secret sessions since 1929, most of the times to deal with matters of

[377] In 1979, a secret session of the House took place to discuss the Panama Canal Act. In 1980, instead, the House of Representatives deemed it proper to call a secret session to consider Communist countries' involvement in Nicaragua. The situation in Nicaragua also formed the subject matter of a 1983 secret session, focused on the U.S. engagement in paramilitary operations. Finally, the House held a closed-door session on March 13, 2008, to discuss the Foreign Intelligence Surveillance Act and electronic surveillance in general – a very hot topic at the time. Id., at 5.

[378] The distinction between legislative and executive sessions as for openness to reporters and the public emerged as a compromise that the U.S. Senate reached with state legislatures with respect to the degree of openness of congressional proceedings. Only executive sessions could enjoy the privilege of secrecy for more than a century. Id., at 3 note 12 (referring to the Senate Historian's Office, http://www.senate.gov/artandhistory/history/minute/Executive_Sessions.htm).

national security[379] or foreign affairs[380], or to discuss the impeachment of federal judges[381]. Impeachment proceedings against President Clinton led to six secret sessions of the Senate. Furthermore, the Senate practice of holding closed meetings to address international treaties, especially when they involve delicate matters, has not disappeared[382].

The two Houses of Congress have separate regulation for secret sessions. Rule XVII, clause 9, of the House of Representatives sets down the conditions on which a secret session may be held: when the House has received confidential communications from the President of the United States or when a Representative acquaints the House with possession of

[379] On July 14, 1966, for example, a secret session was aimed at considering Senate Resolution 283, proposed by Senator William Fulbright, Chairman of the Foreign Relations Committee. The resolution "advocated the creation of a separate Senate Committee on Intelligence Operations to oversee the major intelligence agencies." FREDERICK M. KAISER, *Legislative History of the Senate Select Committee on Intelligence*, CRS Report for Congress (August 16, 1978), p. 4. In 1972, the Senate tackled a controversy on disclosure of the Pentagon Papers, a study on the U.S. policy towards Vietnam and on the subsequent conduct of the Vietnam War, by holding some closed-door sessions. On the Pentagon Papers affair, see infra. Senator Mike Gravel requested the publication of the memorandum in the Congressional Record. The memorandum, in fact, was no mystery to the American people, as some portions of it had come out in newspapers and magazines. On May 2 and 4, 1972, the Senate held secret sessions to debate the propriety of disclosing the memorandum, which was then still classified. Therefore, as has been observed, the key question the Senate found itself discussing behind closed doors "[was] whether the Senate, without executive branch permission, could declassify documents." *House, Senate Probe Government Classification Policy*, in CQ Almanac 1972 (28th ed., Washington, D.C.: Congressional Quarterly, 1973), available at https://library.cqpress.com/cqalmanac/document.php?id=cqal72-1249450. During the May 2 and 4 secret sessions, Gravel's request was not put to the vote, so the Senate failed to take a final stand. Nevertheless, the Senate, accepting a proposal put forward by Senator Robert C. Byrd, published an edited transcript of the secret sessions in the May 5 Congressional Record. According to Byrd, indeed, "nothing was said during the secret session that revealed sensitive information […]." Ibid. The affair was not over. On his own initiative, Gravel had a broad portion of the Pentagon Papers printed in the May 9 Congressional Record, after reading it on the floor. He received a good deal of criticism for doing so without awaiting the Senate approval.

[380] On May 15, 1978, for example, there was a Senate closed session aimed at analyzing upsides and downsides of selling military aircrafts to Egypt, Israel, and Saudi Arabia.

[381] For instance, on December 7, 2010, the Senate held a closed-door session to debate the impeachment of a federal judge of Louisiana, G. Thomas Porteous, Jr. See DAVIS, *Secret Sessions of the House and Senate*, supra note 346, at 3.

[382] On December 20, 2010, for instance, the Senate opted for a secret session to discuss the ratification of New START (Strategic Arms Reduction Treaty; official name – Measures for the Further Reduction and Limitation of Strategic Offensive Arms), a treaty between the United States and Russia on the reduction of nuclear arms. In 1997, instead, a Senate secret session was devoted to the Chemical Weapons Convention Treaty. Ibid.

communications to be kept confidential. In such cases, once the House has been cleared of all outsiders, the communications may be read, and proceedings may be carried out. As to how to request the closure of proceedings, either a special rule or a specific motion made in the House may entail a secret session. The motion for a secret session may not be debated, "but is subject to the motion to lay on the table"[383]. The Representative who offers the motion for a secret session is granted one hour of debate after the House resolves into secret session. If the motion is approved by a simple majority, the House is cleared of everyone other than Members of the House, "and those officers and employees specified by the Speaker whose attendance was essential to the functioning of the secret session."[384] These employees are directed to sign an oath of secrecy. The discussion of a motion to disclose the content of the closed session may be allowed, as well, "within narrow limits of relevancy."[385] Even if the motion is rejected, the House may by unanimous consent have the transcripts of the secret session published in the Congressional Record, as edited according to suggestions made by committees. The confidential communications to be read and discussed in secret session may well be in possession of a congressional committee[386].

As regards the upper chamber, Rule XXI of the Standing Rules of the Senate lays down the basic regulation of secret sessions[387]. Under Paragraph 1, if another Member of the Senate seconds a motion for a closed session offered by any Senator, the Presiding Officer is obliged to have the chamber cleared, and direct that the doors remain closed throughout the session. Therefore, it has correctly been observed that the Presiding Officer is granted "no discretion about going into secret session if the motion is made and seconded."[388] The motion to shield a session from public access, therefore, is debated. Paragraph 2, instead, cross-refers to rules XXIX and XXXI. The former is devoted to executive sessions – i.e.,

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[383] U.S. HOUSE OF REPRESENTATIVES, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States One Hundred Fourteenth Congress*, H.Doc. 113-181, 113th Cong., 2nd sess. (Washington, D.C.: Gov't Publ. Off., 2015), p. 778.

[384] Id, at 779.

[385] Id., at 778.

[386] For instance, a secret session that took place in the 96th Congress (1980) was concerned with classified information held by two House committees – the Committee on Foreign Affairs and the Permanent Select Committee on Intelligence. They both had specifically authorized usage of the classified material in a secret session of the House of Representatives. Given the existence of that very specific authorization, the Speaker overruled a point of order objecting to the motion of a secret session. Id., at 779.

[387] Available at http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome.

[388] DAVIS, *Secret Sessions of the House and Senate*, supra note 346, at 2.

sessions aimed at considering executive business, whose scope includes nominations and treaties. Paragraph 2 of Rule XXIX contains the list of persons allowed to remain inside the chamber when the Senate doors are closed for examination of either simply executive or confidential matters. The list is an open one, for the Presiding Officer is empowered to pinpoint discretionally further officers who are permitted to attend a secret session. All officers present at such a session are sworn to secrecy. By approving a specific resolution, however, the Senate may remove the injunction of secrecy[389]. The order prescribing the removal has to be published in the Congressional Record[390]. Rule XXIX(5) provides for serious sanctions to impose on those who violate the injunction of secrecy, and specifies that the sanctions also apply to the illegal disclosure of confidential information dealt with in committees and subcommittees. Those sanctions consist in expulsion from the assembly, if the transgressor is a Senator, or in dismissal from service and punishment for contempt, if the violation is committed by either an officer or an employee. Rule XXXI(2) establishes a general rule of openness for the carrying out of Senate business, and requires a majority vote for an executive session – devoted to either a particular nomination or an international treaty – to take place in secret. In such cases, the secrecy of proceedings may be overcome by a majority vote, and each Senator is allowed "[to] make public his vote in closed executive session." The matter of secret sessions is also addressed in the Rules on Impeachment Trials of the Senate[391]. Rule XX provides that when considering an impeachment trial, the Senate be supposed to hold open meetings, unless it decides otherwise. A motion for a closed-door session may not be debated. If any Senator objects to it, the motion is immediately put to the vote, and "yeas and nays […] shall be entered on the record."[392]

E. Secrecy in Congressional Committees

The poor level of transparency that features business transacted in congressional committees has frequently been denounced throughout the American experience, even in

[389] Rule XXIX(3).

[390] Rule XXIX(4).

[391] See Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials, in U.S. SENATE, *Senate Manual containing the Standing Rules, Orders, Laws, And Resolutions Affecting the Business of the United States Senate*, 113th Congress, 1st Sess. (Washington, D.C., Gov't Print. Off., 2014) p. 223.

[392] Id., at 227.

recent years[393]. In his autobiography, Robert La Follette, a U.S. Senator from Wisconsin 1906 through 1925, in addition to censuring parties' practice of delegating the adoption of crucial decisions to an inner circle of chosen politicians, clearly described the state of frustration he found himself in detecting shortage of openness in committee activities[394]. The fact that a good deal of committee business is conducted in secret might be seen as an alarming issue, in consideration of the pivotal role committees have within the legislative branch of government. The scope of committee activities, indeed, covers all main functions vested in Congress, as it ranges from legislative drafting to executive branch oversight and even to policy formulation[395]. In general terms, at the heart of the congressional committee system are standing committees, i.e., the committees established by statute or resolution to operate permanently[396]. Welsh has characterized standing committees as "the workhorses of

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[393] See, e.g., PERLA NI, Open House Project group, September 4, 2007, available at https://groups.google.com/forum/#!topic/openhouseproject/H7QYJhuzpuU ("We just did a survey of what transcripts/audio/video is available from Congressional Committees […]. You'll notice how many committees for which there is no audio, no video nor transcript available […]. Also, for the ones that do post video, either it's not posted until months after or it's posted, but not archived so if you miss it, you've missed it.") (quoted in Free Government Information (FGI), *Congressional Committees - Secrecy and Delayed Transparency*, available at http://freegovinfo.info/node/1405).

[394] See ROBERT M. LA FOLLETTE, *La Follette's Autobiography: A Personal Narrative of Political Experiences*, 298-99 (Madison: The Robert M. La Follette Co., 1913) ("Since I came to the United States Senate [, again] and again I have protested against secret hearings before Congressional committees upon the public business. I have protested against the business of Congress being taken into a secret party caucus and there disposed of by party rule; I have asserted and maintained at all times my right as a public servant to discuss in open Senate, and everywhere publicly, all legislative proceedings, whether originating in the executive sessions of committees, or behind closed doors of caucus conferences.")

[395] MICHAEL WELSH, *An Overview of the Development of U.S. Congressional Committees*, Law Librarians' Society of Washington, D.C. publication (July 2008), p. 1 (arguing that "[b]esides their role in crafting legislation, [congressional committees] have become the instruments through which Congress oversees executive agencies and participates in formulating and overseeing national policy.") As for the instruments to perform those functions, all types of committees are allowed to hold hearings and carry out investigations. Practice shows that only standing committees usually report out legislation, instead, as they are the category of committees more directly involved in legislative procedures. Id. Standing committees, indeed, are empowered to intervene significantly on ongoing legislation by sifting and amending bills before their final passage.

[396] Welsh points out that when referred to standing committees, the adjective "permanent" should not be meant in an absolute sense, especially with respect to the House of Representatives. Firstly, the House – unlike the Senate – lacks continuity, and thus it needs reconstituting when each new Congress commences its functions. Secondly, both the House and Senate enjoy discretion to abolish standing committees, provided that their own rules are amended accordingly. Id., at 1 note 1.

Congress."[397] The other types of committees, indeed, have a more restricted role within the overarching framework of Congress[398].

Woodrow Wilson detected a "despotic principle" of secrecy in the carrying out of congressional activities[399], and committee proceedings represent the paradigm of such secrecy[400]. Congressional committees, indeed, tend to deploy secrecy much more than it is invoked for floor debates and proceedings. Rudesill has noted that as of the nineteenth century, floor activities were kept secret only in exceptional circumstances, while committees continued to meet behind closed doors quite frequently, thereby following a tradition of secrecy that was typical of the Continental and Confederation Congresses[401]. This gap in the usage of secrecy between floor and committee activities – the Author points out – still exists today: on the one hand, the two Houses hold "open full chamber sessions to debate and pass the law," with closed sessions taking place only sporadically; on the other hand, committees tend to carry out closed-door proceedings on a regular basis "to consider non-public information."[402] The secrecy of committee debates might stir up alarm, for, as Wilson observed, they are essential to molding legislation[403]. However, despite pointing out that public scrutiny is thwarted by the tendency "to shift the theatre of debate upon legislation from the floor of Congress to the privacy of the committee-rooms,"[404] Wilson recommends

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[397] Id., at 1.

[398] Select and special committees imply the existence of a contingency, and – therefore – are devised to work temporarily, and established just to achieve a given purpose. Ibid. Once the purpose is reached, their mission is accomplished, so they should cease to exist. In fact, select committees tend to last much longer than special committees, as the very term "special" suggests. Joint committees, instead, differ manifestly from the other committee categories, especially for their composition, which is given by an equal number of Representatives and Senators. Id., at 2.

[399] WOODROW WILSON, *Cabinet Government in the United States*, in MARIO R. DI NUNZIO (ed.), *Woodrow Wilson: Essential Writings and Speeches*, 219 (New York: New York University Press, 2006) (quoted in JAMES J. MARQUARDT, *Transparency and American Primacy in World Politics*, 71 (Burlington, VT: Ashgate, 2011)).

[400] WOODROW WILSON, *Congressional Government: A Study in American Politics*, 84 (Boston and New York, 1885) (maintaining that congressional committees are "accustomed to hold their sessions in absolute secrecy.") Since committee business is governed by a rule of secrecy, transparency of proceedings and debates through open-door sessions – the Author argues – ends up being a sort of "concession" granted by committees. Ibid.

[401] See RUDESILL, *Coming to Terms with Secret Law*, supra note 338, at 254-255.

[402] Id., at 255.

[403] WILSON, *Congressional Government*, supra note 400, at 82 (contending that "it is the discussions which take place in the Committees that give form to legislation.")

[404] Id., at 81.

not overestimating the impact of committee secrecy. When drafting legislation, Congress benefits from frank discussion and competent advice, which are more likely to arise behind the closed doors of committee hearings and meetings[405]. The veil of secrecy that covers up committee proceedings and debates allows everyone involved – not only members of Congress, but also the officers, scholars, and stakeholders participating in hearings – to express their position freely, and even though full discussion may generate conflicts, it favors a better balancing of the interests at stake[406]. Therefore, secrecy is justified by the nature of committee activities, which end up resembling those carried out in workshops. In Wilson's opinion, indeed, committees – namely, standing committees – "are legislative workshops that conduct their affairs 'separately and in secret.'"[407] Committee business comes down to "a joust between antagonistic interests,"[408] while the battle on principles is up to the floor. Even if committee activities were published in detail – the Author continues – their verbatim accounts would be of little use to the public, and thus would represent no significant contribution to the democratic principle[409]. Wilson concludes that reduced transparency is totally consistent with the nature of committee business, which is instrumental to the powers vested in the two Houses of Congress[410].

Specific regulation governs secrecy in congressional committees. As for the House of Representatives[411], first of all, Rule XI(e)(1)(A) requires that each committee keep a

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[405] Id., at 82 (maintaining that the "siftings of legislative questions by the Committees are of great value in enabling the House [and the Senate] to obtain 'undarkened counsel' and intelligent suggestions from authoritative sources.")

[406] Id., at 82-83 (observing that "the controversies which spring up in the committee-rooms, both amongst the committee-men themselves and between those who appear before the Committees as advocates of special measures, cannot but contribute to add clearness and definite consistency to the reports submitted to the House [and to the Senate].")

[407] MARQUARDT, *Transparency and American Primacy*, supra note 399, ibid. (quoting WOODROW WILSON, *Congressional Government: A Study in American Politics*, 133 (New York: The World Publishing Company, 1964)).

[408] WILSON, *Congressional Government*, supra note 400, at 85.

[409] Ibid. (arguing that debates taking place in committees (and subcommittees) of Congress "could scarcely either inform or elevate public opinion, even if they were to obtain its heed.")

[410] Id., at 83 (contending that a reason for excluding the publication of committee proceedings is that committees are "commissioned, not to instruct the public, but to instruct and guide the House [and the Senate].")

[411] Rule X(1)(a)-(t) of the House of Representatives lists the standing committees the House itself is composed of and the subject matters entrusted to each of them. Under the general principle given in Rule XI(1)(a)(1)(A), the Rules of the House of Representatives also apply to its committees and subcommittees, within the limits of applicability.

complete record of all its proceedings and activities. By using wording that recalls the regulation of the Congressional Record contained in the U.S. Code, Rule XI prescribes that committees ensure "a substantially verbatim account of remarks actually made" in the course of hearings or meetings, and allows for only slight editing of delivered speeches "[due to] technical, grammatical, [or] typographical [reasons]." Mandatory transcript extends to any vote taken, whose record has also to be made available in electronic form, and a summary description of the subject matter of any vote is requisite, as well[412]. All records of a given committee are to be physically separated from the congressional records pertaining to the Representative serving as chair of that committee. The former are property of the House, and any Member, officer, or employee of the House is entitled to gain access to them[413]. Furthermore, Rule XI(e)(5) directs committees to have each hearing and meeting taped in both audio and video formats[414], and to ensure that the recording be of easy access to the public[415]. Rule XI(g)(1) requires that each meeting of any standing committee or subcommittee be "open to the public, including to radio, television, and still photography coverage." In the course of an open meeting, however, if the majority of the members is present, a committee or subcommittee is allowed "by record vote" to switch the remainder of the meeting into executive session and therefore into a secret session. The doors of the meeting may be closed when the disclosure of the matters the committee or subcommittee is to deal with "would endanger national security, would compromise sensitive law enforcement information, would tend to defame, degrade, or incriminate any person, or otherwise would violate a law or rule of the House." The same provision is established by subparagraph (2)(A) with respect to committee or subcommittee hearings. Either rule on the shielding of business from public access do not apply to meetings or hearings held by the Committee on Ethics or its subcommittees. Under subdivision (C), members, officers, or other staff may be denied by majority vote of a committee or subcommittee "nonparticipatory attendance" of a given hearing or of a series of hearings for the same reasons meetings and hearings may be closed to the general public. As for the Committee on Ethics, by contrast, secrecy is the general rule, while openness is the exception. Rule XI(3)(h)(1), indeed, requires that all meetings and hearings be held in executive session and therefore in secret. This secrecy rule is subject to two exceptions: one established by the

[412] Rule XI(e)(1)(B)(i).
[413] Rule XI(e)(2)(A).
[414] Rule XI(e)(5)(A).
[415] Rule XI(e)(5)(B).

provision itself; it is for the members of the Committee, instead, to invoke the other. As far as the former is concerned, whenever the Committee holds a hearing devoted to sanctions, or a hearing takes place before an adjudicatory subcommittee, the hearing is open to the public. This exception, however, can be overcome by a majority vote of the committee that opts for a closed-door hearing[416]. Furthermore, the committee members are empowered to avoid that meetings and hearings be held in executive session, and thus be governed by a secrecy rule by adopting a majority vote that allows the public into the meeting or hearing. Finally, Rule XI(4) addresses audio and video coverage of committee proceedings. The scope of this coverage embraces all committee meetings and hearings that are accessible to the public[417]. Rule XI(4)(a) suggests that committees' transparency enables the people to better grasp the importance of the House as a body of the federal Government, thereby implying that when such transparency is missing and audio and video coverage of committee business is not permitted, the functions of the House appear more obscure to the general public.

Similarly, the Senate committees have their own regulation of activities carried out in secret[418]. Rule XXVI(5)(b) of the Standing Rules of the Senate requires the openness to the public of any committee or subcommittee meeting, including those devoted to the conduction of hearings. Any Senator, however, is entitled to present a motion for the closing up of a meeting or a series of meetings, and if other members second the motion, the closing up is permitted, but it may not last more than fourteen calendar days. The matters, the discussion of which justifies the exclusion of the public from a meeting or a series of meetings are set out in clauses (1) through (6). More markedly than what the Rules of the House of Representatives do when pinpointing the reasons for closed-door meetings and hearings, those clauses recall some of the nine exemptions to the Freedom of Information Act, which allow executive branch agencies to withhold information from the public. Clause (1) refers to the two domains that are located at the core of executive branch secrecy – national security and foreign affairs. Clause (2), instead, authorizes a meeting or a series of meeting to be held in secret when the matters to discuss are concerned with committee staff

[416] Rule XI(3)(h)(2).

[417] Rule XI(4)(e).

[418] After providing that the Senate standing committees are to be appointed "at the commencement of each Congress," and are subject to the principle of continuity in the carrying out of business, paragraph 1 of rule XXV of the Standing Rules of the Senate enumerates the existing standing committees (subparagraphs (a) to (p)). The number of Senators each committee has to consist of is set forth by paragraphs 2 and 3 of the same rule.

personnel or purely internal procedures. Under clause (3), secrecy is possible when the matters to consider or the testimony to be taken at a meeting or more meetings may result in charging an individual with crime or misconduct, "or will represent a clearly unwarranted invasion of the privacy of an individual." Clause (4) identifies the confidentiality that surrounds law enforcement investigations as a cause for secret meetings of Senate committees. Clause (5) pertains to financial or commercial information and to trade secrets that may be included in it, and allows a committee to hold closed-door meetings if either an act of Congress calls for confidentiality in the handling of that information or the unduly disclosure of the information would compromise competition by harming the position on the market of the concerned individual. Finally, clause (6) refers to other matters that statutes or executive branch regulations prescribe to be kept confidential. In addition, the closing of a committee meeting may represent a measure the Chair of the committee adopts to maintain order whenever disorder or protests spring up during an open meeting[419]. Each committee is required to keep a complete transcript or electronic recording of all its proceedings, even if some business is transacted in secret, unless a committee determines by a majority vote the exclusion of part of its proceedings from recording[420].

F. The Theory of Bleisch on Accuracy of the Congressional Record

a. The Revision Privilege for Members of Congress

The so-called revision privilege, which – as Bleisch has noted – is acknowledged "[as] a matter of congressional tradition,"[421] allows the members of Congress to revise and extend speeches delivered on the floor before they are published in the Congressional Record, and even to insert in it new remarks, never pronounced in Congress. The privilege is believed to date back to the first half of the nineteenth century, when editors of the Register of Debates began boosting the editing of remarks actually made on the floor by Congressmen[422]. It has been pointed out that originally, the scope of the privilege "was virtually unlimited."[423] Not only could members of Congress make any adjustments to

[419] Rule XXVI(5)(d).
[420] Rule XXVI(5)(e)(1).
[421] BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 349.
[422] Id., at 342 note 7 (referring to MCPHERSON, *Reporting the Debates of Congress*, supra note 346, at 144 note 22).
[423] Id., at 349.

remarks prior to their publication, but they were also permitted to add brand new speeches, never delivered on the floor. Furthermore, alterations to the verbatim transcript of speeches and remarks were not supposed to be marked as such, and as a result, it proved hard to distinguish edited speeches from those constituting the mere transcript of what was uttered in the course of congressional debate[424]. After some unsuccessful attempts, in 1978, Congress eventually passed a resolution to limit the use of revision privilege. Under the resolution, *ex-novo* speeches – i.e., speeches inserted in the Congressional Record as completely new material, since they were not delivered on the floor at all – were supposed to be delimited and thus marked by circular symbols called bullets[425]. The working of this mechanism, however, did not prove flawless[426]. Two main reasons for the existence and propriety of use of revision privilege have been raised. The first one refers to the purpose to correct and remove either typographical errors committed by official reporters in the transcript of debates or grammatical mistakes made by members of Congress when delivering a speech. Bleisch has stressed that in addition to coping with mechanical mistakes, this reason may extend to provide members of Congress with a remedy for "indecorous remarks made in the heat of debate."[427] The justification for invoking the privilege appears to be straightforward in all these cases, which have in common the fact that the privilege acts as a means to edit what has actually been uttered on the floor. The other primary reason underlies the usage of the privilege as a tool for members of Congress to enjoy more room – and time – than they are granted on the floor.

Bleisch opposes both justifications. Even though it is admirable the concern for transparency that may be deduced from his objections, I consider his stand too rigid. First, the Author points at the practice of allowing members of Congress to correct grammatical errors made in delivering speeches, and argues that such a practice results in "obscur[ing] the *Record*'s significance as an historical record."[428] If a member of Congress taking the floor gives a speech replete with mistakes, the speech – Bleisch observes – should be kept

[424] Id. It has been emphatically contended that the Congressional Records contains "not only what was said in Congress, but also what members want people to believe they would have said had they been there [, and it is] hard to tell one from the other." Id., at 349 note 47 (quoting 121 Cong. Rec. 26, 33745 (1975) (remarks of Rep. Hubbard Jr.)).

[425] See 124 Cong. Rec. 4, 5207-09 (1978).

[426] See BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 351-352 (mentioning practical situations in which the bullet mechanism unveils some shortcomings).

[427] Id., at 355.

[428] Id., at 356.

as such, to form evidence of a poor performance[429]. By the same token, Bleisch argues that even injurious remarks or expressions should be transcribed in the Congressional Record, as otherwise the historical value of the Congressional Record would be diminished. In other words, publishing insults actually pronounced may help grasp the dynamics of a certain debate in Congress[430]. Finally, Bleisch seems to challenge the propriety of inserting in the Congressional Record remarks not even partly uttered on the floor, for they affect – potentially at least – the process of detecting Congress's legislative intent. The Author, indeed, assumes that since such remarks "[have gone] unchallenged on the floor," thereby escaping any chance of rebuttal, they may orientate significantly the reconstruction of legislative intent[431].

Bleisch's position stirs up some observations on each count. It is undeniable that members of Congress are to be held accountable – especially to their constituents – for the speeches they deliver and for the way they express themselves on the floor. However, such speeches should be evaluated mainly by their contents. What is important of a speech is the message(s) it conveys, and the message is hardly affected by grammar mistakes. When it comes to insulting remarks, instead, Bleisch apparently has a point. The function of historical evidence would suggest that the Congressional Record contain transcripts of insults as they were uttered on the floor. However, Bleisch formulated its objection in 1985, when paper-based dissemination of material was the rule. Today, the Internet and social networks make almost impossible for insults and gaffes to go unnoticed, insofar as potentially libelous remarks are exploited to slam political opponents, regardless of how embarrassing it may be for those to whom such remarks are ascribed[432]. Criticism to added remarks, too, should be

[429] A Representative or a Senator making a large number of mistakes when speaking on the floor should not benefit the privilege of removing them, for she is the only one responsible for a speech "[which] was poorly organized or poorly delivered." Id, at 356.

[430] Ibid. (maintaining that "[h]istorical knowledge of a single insult may go far in explaining the cooperation of certain participants in the debate.") To corroborate his point, the Author also quotes the following statement made by a Senator in the late Fifties: "[T]he inevitable added zest and controversy and slips and lapses could make the *Record* a far more lively and readable document." SEN. NEUBERGER, *The Congressional Record Is Not A Record*, N.Y. Times, April 20, 1958 (Magazine), reprinted in 132 Cong. Rec. 26, 33519 (1977) (quoted in BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 356 note 94).

[431] Id., at 357.

[432] Id., at 356 (noting that "mudslinging and name calling [arising from congressional debates] might prove embarrassing in print.")

lessened, especially after the adoption of the bullet mechanism[433]. Members of Congress deserve a chance to explain their viewpoints in a more comprehensive fashion than they are allowed to do on the floor. Even though social networks allow them nowadays to interact simultaneously with anyone and thus to clarify their remarks before their constituents on a regular basis, members of Congress may perceive the need to endow their views with an official format. On the one hand, the insertion of speeches and remarks that were not actually made on the floor reduces the Congressional Record's value as purely historical evidence. On the other hand, transparency is safeguarded by the very publication of such remarks in the Congressional Record, and even strengthened by the usage of bullets to split original from added material.

Added speeches are not subject to the criticism that could have arisen had they been delivered on the floor, but do not benefit from substantial contributions that oral discussion could have brought to those speeches. Therefore, having speeches and remarks printed in the Congressional Record without exposing them to criticism in Congress may not be the most appropriate choice for a Representative or a Senator. Furthermore, to corroborate his opinion, Bleisch makes a case that, however, refers to a rather unusual situation. He maintains that added speeches and remarks turn out to be deceiving for those who depend on the Congressional Record to detect Congress's legislative intent whenever a member of Congress advocates a given position in the course of debate, but then her added remarks express a different standpoint. The Author finds that such discrepancy may entail serious effects, since the member of Congress "may influence the deliberations or vote [on the floor] and subsequently uses her revision privilege to alter her statement [thereby reflecting] a different intent before her remarks are printed in the Record."[434] The situation the Author describes, however, is unlikely to occur frequently, especially if the discrepancy mentioned above is deliberately meant to affect the reconstruction of legislative intent. Moreover, it is hard to believe that an individual member of Congress's change of position – for instance – is capable of affecting considerably the interpretation of legislative history of a given statute. Only a reversal of standpoint coming from a very authoritative member of Congress might

[433] See MILDRED AMER, *A User's Guide to the Congressional Record*, CRS report for Congress (May 6, 2008), p. 1 (pointing out that in the section of the Congressional Record devoted to the Senate floor proceedings, a bullet is used to distinguish added remarks from speeches actually delivered on the floor, while in the section pertaining to the proceedings of the House of Representatives, "any portion of a statement not spoken [on the floor] is printed in different type style.")

[434] BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 357.

produce such an effect, but then such a member would need to appeal to extremely sound arguments to explain her behavior without losing her reliability. However, transparency is ensured in any event: Whether or not the reasons for the reversal of standpoint are persuasive, they are put on record, so constituents are able to hold the Representative or Senator accountable.

Bleisch argues that the scarce accuracy of the Congressional Record due to lack of correspondence between what has been uttered on the floor and what is published in the Congressional Record entails serious implications for the business conducted by the executive and judicial branches of the Federal Government. The premise to Bleisch's reasoning is that not only does the Congressional Record prove useful to scholars and journalists interested in congressional proceedings, but federal agencies and courts, too, depend much on it "for discerning congressional intent […]."[435] Agencies usually look to the Congressional Record in the drafting process of regulations. Since their regulations are aimed at the implementation and enforcement of federal statutes, agencies – the Author observes – need to look through the Congressional Record to infer the true meaning of statute provisions from their legislative history. By doing so, agencies ensure that the regulations they draft be consistent with legislative intent of the statutes that such regulations are supposed to implement. Consequently, Bleisch contends that "an inaccurate *Record* could result in the promulgation of federal regulations which do not adequately reflect congressional intent."[436] In like manner, federal courts usually draw upon the Congressional Record to understand what Congress actually intended when it passed a given statute. Courts, therefore, may well be biased by remarks not made on the floor, which are capable of shrouding the authentic legislative intent of federal statutes[437]. Bleisch seeks to sustain his assertion by referring to the National Environmental Policy Act of 1969[438], the legislative intent of which courts deduced by consulting the Congressional Record in a multitude of

[435] Id., at 341. The Author indeed notes that administrative agencies and courts are "the two major forums for the implementation of governmental policy." Ibid. (referring to Cong. Rec. 18, 23860 (1975) (remarks of Sen. Packwood)).

[436] Id., at 358.

[437] "When an unstated argument has been printed without rebuttal, legislative intent can be clouded forever." (remarks of Rep. Steiger). 124 Cong. Rec. 4, 5110 (1978) (quoted in BLEISCH, id., at 358 note 102).

[438] Pub. L. 91-190, 83 Stat. 852 (January 1, 1970), codified at 42 U.S.C. §4321 et seqq.

cases[439]. The Author casts doubts on the actual capability of courts to identify the congressional intent in all such cases, since it was impossible to separate for certain within the content of the Congressional Record what constituted the mere transcript of speeches delivered on the floor from what was added later instead[440]. Such an example, however, is weak evidence, as it suffices to observe that the bullet mechanism was adopted to cope with the very inconvenience regarding the distinction between floor and extraneous material in the Congressional Record. Therefore, Bleaisch's concern for the poor level of accuracy that features the Congressional Record may not be advocated. Both federal agencies and courts, indeed, are able to avoid misunderstanding in detecting the true intent of statutes passed by Congress.

b. Bleisch's Reference to the Right of Access to Information Held By Public Authorities

Furthermore, Bleisch puts forward a theory that finds in some of the rights guaranteed by the First Amendment of the Constitution[441] grounds for requiring more accuracy in the contents of the Congressional Record. The theory moves from including in the First Amendment two rights that courts have gradually recognized as falling within the scope of this amendment: the right to receive information from Congress and agencies, and the right of access to information held by public authorities. As to the former, however, Bleisch himself notes that the restrictions courts have formulated over time to its application[442] lead

[439] BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 359 (reporting that federal courts cited the Congressional Record in at least 247 cases concerning the application of the National Environmental Policy Act of 1969).

[440] Ibid.

[441] The amendments of the U.S. Constitution up to the Tenth make up the so-called Bill of Rights. As Corwin has noted, they were proposed in 1789, and it took just 810 days for them to be approved. Corwin, 186 note 1. These ten amendments "were designed to quiet the fears of mild opponents of the Constitution in its original form […]." Id., at 186. The First Amendment requires that the Federal Government as a whole protect a series of freedoms and rights, at the core of which are the following: freedom of speech; freedom of religion; freedom of the press; the right of peaceable assembly. By the mid-twentieth century, the Supreme Court had extended the prescription of safeguarding such freedoms and rights to the individual states of the Federation. See – respectively – *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (including both freedom of speech and freedom of the press "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); *Cantwell v. Conn.*, 310 U.S. 296 (1940); *Near v. Minn.*, 283 U.S. 697 (1931); *DeJonge v. Ore.*, 299 U.S. 353 (1937).

[442] BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 364-366 (referring to the following supreme Court decisions: *Lamont v. Postmaster General*, 381 U.S. 301

to rule out that the right to receive information could be invoked by individuals to demand a more accurate Congressional Record. As the Author points out, the revision privilege trumps the right to receive information, insofar as Congress may "simply asser[t] its power to control the contents of a document for whose publication it is solely responsible,"[443] i.e., the same Congressional Record. Moreover, Bleisch himself concedes that, regardless of the Congressional Record, there is nothing prohibiting members of Congress from disseminating transcripts of portions of debates without editing them. In fact, the Internet provides Representatives and Senators today with potential for such voluntary disclosure, which – in that sense – may well wind up remedying to the impurity of the Congressional Record.

As noted above, Bleisch also comes up with a proposal for curbing the use of revision privilege based on the right of access to information held by the Government – namely, by entities within the executive branch. Such a proposal lacks any soundness, at least in the way it is formulated. Bleisch, indeed, picks cases that generate confusion instead of contributing to corroborating his theory. In particular, he refers to two similar 1974 cases[444], wherein the plaintiffs challenged prison regulations for not allowing journalists to interview inmates and thus for restricting the right of the press to gain information on prison conditions. The plaintiffs – inmates and journalists in the first case, the Washington Post and one of its reporters in the second one – claim that the denial of interviews infringe a right of theirs grounded in the First Amendment: the right to gather news (on a public facility), and hence the right of access to information concerning the public sector. In both cases, the Supreme Court holds that neither of the prison regulations challenged by plaintiffs limits the freedom of members of the press to request conversations and interviews with inmates, provided that the peculiar dynamics of a prison are respected. Furthermore, the Court refuses to recognize to the press members a wider right of access to public authorities' information than that any person enjoys. Bleisch also refers specifically to the dissenting opinions of Justice Powell, who – especially in *Saxbe*, that is, the second case – "created the framework for a judicial theory of a constitutionally based right of access to governmentally held information."[445] Justice Powell argues that since the press is protected by the First Amendment in its search

(1965); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Virginia state Board of Pharmacy v. Virginia County Consumer Council*, 425 U.S. 748 (1976)).

[443] Id., at 366.

[444] *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington*, 417 U.S. 843 (1974).

[445] BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 370.

for news, in a case concerning the management of a federal facility, the restriction of such a right recognized to the press calls for "stronger grounds than simple governmental deference […]."[446] Apart from the credit that Justice Powell deserves for showing sensitivity towards the press's rights, the cases at issue do not appear to be the most suited for championing a right of the members of the press to gather official information. In *Saxbe*, indeed, the Court notes that the federal regulation challenged by the plaintiffs prohibits media members neither from touring the prison and visiting friends or relatives who are inmates[447], nor from questioning ex-prisoners on the treatment they received when they were serving their time in the facility[448]. Furthermore – and above all – it was only with a 1980 decision, *Richmond Newspapers, Inc. v. Virginia*[449], that the Supreme Court began taking steps towards the recognition of a First Amendment right to openness. As Bleisch himself observes, however, it is highly unlikely that the Supreme Court will go so far as to prescribe nearly total accuracy of the transcripts of congressional debates to be published in the Congressional Record[450]. The Author also argues that nevertheless, limiting the scope of revision privilege would have the beneficial effect to "prohibi[t] the government from distorting information that it voluntarily disseminates to the extent that such information reflects upon the government's official actions and proceedings."[451] The editing of speeches delivered on the floor and the insertion of further remarks in the Congressional Record – Bleisch explains – ends up affecting the democratic principle, as constituents are not capable of evaluating outright the actual performance of Representatives and Senators[452].

[446] Id. In particular, Justice Powell stated that "official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience." *Saxbe*, at 860. Powell also cited a precedent where the Supreme Court had contended that "without some protection for seeking out the news, freedom of the press could be eviscerated." Ibid. (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

[447] *Saxbe*, at 846-847.

[448] Id., at 848.

[449] 448 U.S. 555 (1980).

[450] BLEISCH, *The Congressional Record and the First Amendment*, supra note 346, at 374-375.

[451] Id., at 376.

[452] Id., at 376-377.

c. Overall assessment of Bleisch's Theory

Overall, Bleisch's opinion is not tenable, especially now in the so-called Information Age. As I pointed out above, the Internet offers plenty of tools and occasions for members of Congress to stay in touch steadily with their constituents[453], and social networks have definitely increased the chances for the latter to hold politicians accountable. Furthermore, this potential enabled by technology, which includes the online streaming of debates and committee or subcommittee meetings and hearings, favors transparency of the legislative branch. Today, it is somewhat hard to maintain that the partial inaccuracy of the Congressional Record may hamper the functions vested in the judiciary and federal agencies. Firstly, the bullet mechanism has solved a good deal of the issue by marking what has not been uttered in Congress, so that it can be told apart quite easily from speeches delivered on the floor. Secondly, the addition of new remarks and further material in the Congressional Record – provided that they are relevant to the subject matter at issue – results in improving the legislative branch's transparency. As Italian scholars have explained in a more clear fashion – from a purely theoretical perspective – than American ones, the concept of transparency does not boil down to gaining access to records, but implies the demand that transacted business be made intelligible to anyone. In that sense, the material inserted in the Congressional Record, albeit not directly related to floor debates, proves useful. If the added material is deliberately aimed at obscuring the legislative intent of a given statute as arising from the Congressional Record, the objective of ensuring transparency is not achieved. In such cases, however, the members of Congress are subject to the political sanction of being held accountable by their constituents. Therefore, the democratic principle appears to be safeguarded.

Bleisch, instead, could have been more concerned with the practice of secret sessions, which involves both the two Houses of Congress and their committees and subcommittees. The regulation of the conditions and proceedings for holding secret sessions and exempting the relevant transcripts from being published in the Congressional Record, however, is an adequate bulwark against abuses. Furthermore, the reasons for holding secret sessions that the members of Congress may invoke have in common a very telling element. The wording that the Rules of the House of the Representatives and the Standing Rules of the Senate

[453] OLESZECK, *Congress and the Internet*, supra note 368, at 10 (stressing that "the Internet has the potential to foster an interactive, or two-way, process of communication between Members and their constituents, as well as with other individuals and organizations.")

employ to identify such reasons, indeed, recalls that of the exemptions that federal agencies may apply to deny the disclosure of their records under the Freedom of Information Act. To be more precise, a close examination of the wording of the rules of the two Houses of Congress leads to argues that the analogy with the FOIA exemptions – and, especially, with two of the exemptions, i.e., the exemption on national security and foreign affairs, and that concerning law enforcement records – is manifest above all when secrecy applies to meetings and hearings of committees or subcommittees. As to floor proceedings, it is the need to deal with certain matters in executive sessions that appears to be a common justification for closing the doors of the two Houses to the public and the press. In such cases, therefore, the legislator establishes beforehand a general category of sessions that tend to be held in secret. Congress, indeed, is fully aware that some deal of secrecy is necessary not only in the executive, but also in the legislative branch.

II. Transparency and Secrecy in the Judicial Branch

A. Transparency as a Typical Feature of the Judicial Branch

Transparency features the functions carried out by the judicial branch. Weinstein has argued that court secrecy is a matter that should be addressed with extreme caution, because erring on the side of sealed judicial proceedings by restricting excessively public access to courtrooms and records would result in undermining the high level of trust Americans have in courts[454]. A penchant for openness, therefore, ensures the trustworthiness of the judiciary. There exists much agreement, indeed, upon pinpointing transparency – in such a case, meant as a mere synonym to openness – as an element that underpins the robust confidence the judicial branch inspires in people[455]. In the United States, judicial branch transparency does

[454] See JACK B. WEINSTEIN, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & Pol'y 53, 53 (2000) ("The assumption that all aspects of court-centered litigation are out in the open, on the record, and fully explained by the court is an important foundation for the confidence our public has in its courts.")

[455] See *Panel IV: Secrecy and the Courts: The Judges' Perspective*, 9 J.L. & Pol'y 169, 174 (2000) ("One of the reasons the federal judiciary enjoys the high regard and confidence of the people that it does, is that by and large our system is very transparent, very open.") (remarks of Judge Sidney H. Stein). The judiciary as a whole has also been warned that allowing "unnecessary secrecy" in the courts may jeopardize such confidence. Id., at 175 (remarks of Judge David G. Trager).

not boil down to making decisions available to the public, today electronically, but is also visible in the rendering of opinions by judges.

As Ginsburg has pointed out, the disclosure of dissenting opinions marks a clear difference between common law and civil law legal systems. In the latter, typical of continental European countries, courts are required to render "a collective judgment, cast in stylized, impersonal language."[456] The judgment is collective in the sense that it gives voice to the opinion of the court as a whole, while individual judges' standpoint is substantially irrelevant. As a result, the court decision seeks to synthetize different positions, and judges who do not agree upon the opinion rendered by the court they belong to are not allowed to draw up dissenting opinions. As Ginsborg himself has argued, "[d]isagreement, if it exists, […] is not disclosed."[457] By contrast, the United States and other countries sharing the British tradition recognize to each member of a court "the prerogative to write separately."[458] By relying upon his own experience as a Justice of the Supreme Court of the United States, the Author maintains that "an impressive dissent" usually results in improving the quality of the majority opinion, since it prompts the author of that opinion "to refine and clarify her initial circulation."[459] Furthermore, well-structured dissent opinions, especially when rendered by members of a supreme court, may lay the foundations for an evolution in the solution given to important legal issues[460]. Overall, the two approaches – the Anglo-Saxon's and the continental Europe's – reveal different policies, and are aimed at achieving specific objectives. The features of civil law systems previously mentioned, indeed, are deemed "to foster the public's perception of the law as dependably stable and secure."[461] Common-law systems, instead, value "the independence of the individual judge" by granting her the ability to speak her own mind, and thereby ensure "the transparency of the judicial process."[462]

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[456] RUTH B. GINSBURG, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 2 (2011).

[457] Ibid.

[458] Id., at 3.

[459] Ibid.

[460] As Chief Justice Hughes contended, "[a] dissent in a Court of last resort is an appeal […] to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." CHARLES HUGES, *The Supreme Court of the United States*, 68 (1936) (quoted in RUTH B. GINSBURG, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 144 (1990)).

[461] GINSBURG, *The Role of Dissenting Opinions*, supra note 456, at 3.

[462] Ibid.

B. Secrecy in Judicial Proceedings

a. Family Law Cases

Secrecy of the courts, however, is necessary in many diverse situations. Firstly, quite similarly to what happens in the course of federal agencies' decision-making process, not only does confidentiality enables the frank exchange of ideas between judges and with clerks; it also favors the thoughtful formulation of opinions[463]. Judges, therefore, rely on keeping confidential what occurs *in camera* before a holding is rendered. Secondly, courts are often required to strike a balance between openness and secrecy, especially when the privacy of the parties to a judicial proceeding is at stake or sensitive matters are involved[464].

Family law cases constitute an example of judicial proceedings that often require the application of restrictions to transparency. Even though the family court system is administered by individual state courts, and thus does not involve directly the federal judiciary, cases considered by the family courts are noteworthy. They represent, indeed, a paradigm of how the need to reach a compromise between public access to records and proceedings – on one side – and confidentiality – on the other side – may arise outside the field of administrative law. Most of the times, those cases deal with subject matters that are sensitive per se, such as child abuse or neglect, custody and visitation conditions, juvenile delinquency[465]. Closing the doors of the family court used to be the general rule[466], a rule aimed at protecting the concerned children, whose well-being might be compromised by disclosure of information, especially in abuse and neglect cases[467]. Over the last two decades, however, a growing tendency towards making family court proceedings more accessible has sprung up at state level, and New York State law represents a telling example in this regard.

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[463] See WEINSTEIN, *Secrecy in Civil Trials*, supra note 454, ibid. (contending that "everything in court should be public and nothing secret except the internal chambers discussions by judges with their clerks and various drafts of opinions.")

[464] See NICHOLAS SCOPPETTA, Symposium – *Comment*, 9 J.L. & Pol'y 135, 136 (2000) (arguing that the reasons for closing the doors of a court usually imply the existence of "extremely personal, highly confidential matters.")

[465] Id. (referring to a case in which a minor tried before a family court "had a history of prostitution" that was relevant to the judicial proceeding, and the judge discretionary decided not to make "open and available to the public" the records documenting such a history).

[466] See JENNIFER L. ROSATO, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & Pol'y 149, 151 (2000) (noting that "[h]istorically, [cases addressed by the family court] have proceeded under a veil of secrecy.")

[467] Id. (contending that in the family court system, "[t]he culture of secrecy grew out of a desire to protect children from disclosure of sensitive information in abuse and neglect cases.")

In particular, section 205.4 of the Uniform Rules for New York State Trial Courts[468] is concerned with access to family court proceedings. Section 205.4(b) establishes a general principle of openness[469]. The judge presiding in the courtroom, however, is entrusted with "statutory discretion" to exclude either the public or specific individuals from accessing the courtroom "on a case by case basis," provided that supporting evidence is given[470]. Furthermore, the same provision identifies some of the factors the decision of closing the judicial proceeding made by the presiding judge may be based upon[471]. The factors the presiding judge may take into consideration include "the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm […]."[472] Accordingly, moving from the need to preserve the privacy of parties, especially of minors, section 205.5 grants the right of access to family court records to such persons and authorities as the same section enumerates.

b. Secrecy in Civil Litigation: The State Secrets Privilege

The state secrets privilege is used to invoke secrecy in civil litigation, and has been defined as "a common law evidentiary privilege that allows the government to withhold information, the disclosure of which would harm national security."[473] The primary purpose of the state secrets privilege, therefore, is to protect national security by preventing the disclosure of sensitive information in the course of civil litigation[474]. One may wonder whether in addition to being rooted in common law, the privilege also has a constitutional basis. Yet, there is no consensus in scholarship with respect to this issue[475]. Furthermore,

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[468] Available at http://www.nycourts.gov/rules/trialcourts/205.shtml#04.

[469] Section 205.4(a) provides that the family court "is open to the public."

[470] Section 205.4(b).

[471] Section 205.4(b)(1)-(4).

[472] Section 205.4(b)(3).

[473] NEIL KINKOPF, *The State Secrets Problem: Can Congress Fix It?*, 80 Temp. L. Rev. 489, 489 (2007).

[474] Id., at 491.

[475] See CHESNEY, *State Secrets and the Limits of National Security Litigation*, supra note 21, at 1294 (referring to *United States v. Nixon*, 418 U.S. 683, 706 (1974)) (taking into consideration the Supreme Court's dictum in *Nixon*, according to which executive privilege is not absolute, unless military or diplomatic secrets, or other sensitive information pertaining to national security are involved). This dictum – Chesney argues – suggests that state secrets should be treated differently from the exchange of communications within the executive branch that is protected from disclosure by executive privilege. In both cases, however, the withholding of information by executive branch officials on behalf of the U.S. Government is deemed compatible with the Constitution. Therefore,

Kinkopf has argued that "the basic defect of the state secrets privilege," as interpreted by courts, consists in the fact that it does not imply any compromise between the opposing interests in openness, on the one hand, and in protection of the information and documents from release, on the other hand[476]. If the court determines that the privilege applies – the Author continues – "the privilege [itself] is considered to be absolute."[477] As Frost has stressed, the privilege may affect civil litigation in different ways[478].

The Supreme Court expressly recognized the state secrets privilege in a 1953 decision that still constitutes the leading case on the issue, *United States v. Reynolds*[479]. The case involved the application of the Federal Tort Claim Act (FTCA)[480], a statute Congress passed in the aftermath of World War II that allowed individuals to sue the U.S. Government for most torts caused by its conduct[481]. *Reynolds* was concerned with lawsuits brought under

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from the Supreme Court's dictum it can be inferred – Chesney concludes – that not only executive privilege, but "the state secrets privilege also has constitutional underpinnings." Id., at 1295. Pallitto and Weaver, instead, advocate the opposite position: Unlike executive privilege, the state secrets privilege does not have any constitutional foundation, and only originates from common law. PALLITTO – WEAVER, *Presidential Secrecy and the Law*, supra note 86, at 98-99; 105; 117-19; 206.

[476] KINKOPF, *The State Secrets Problem*, supra note 473, at 492.

[477] Ibid. According to the Author, the fact that the state secrets privilege does not contemplate a balance to strike between competing interests distinguishes it from "other governmental privileges, such as the presidential communications privilege […]." Ibid. In like manner, Weaver and Pallitto have stressed that the unlike executive privilege, the state secrets privilege is absolute. PALLITTO – WEAVER, id., at 93 ("Once it is determined that the privilege is asserted over properly classified information, no amount of demonstrated need on the part of a litigant will overcome the operation of the privilege; no balancing can occur, as with executive privilege.")

[478] See AMANDA FROST, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931, 1937 (2007). Firstly, the privilege may be invoked to bar evidence from admission in civil proceedings. The case may proceed further, but without such evidence. Secondly, the application of the privilege may deprive the defendant of information he or she depended upon to organize a sound defense. In such a case, the defendant may be granted summary judgment on usage of that information. Thirdly, if the pivotal subject matter of litigation is a state secret, the invocation of the state secrets privilege brings about dismissal of the case, if the court deems the privilege legitimate. The case, indeed, may not proceed further.

[479] 345 U.S. 1 (1953).

[480] Ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of title 28, U.S. Code).

[481] See CHESNEY, *State Secrets and the Limits of National Security Litigation*, supra note 21, at 1282 (noting that after its enactment, the FTCA was frequently used to claim damages related to accidents that involved military ships and vehicles, and in the course of litigation, plaintiffs usually sought to gain access to internal investigations reports on such accidents, with the Government opposing the release of those reports).

the FTCA by the widows of three men who died in the crash of an Air Force B-29, which was flying to test classified equipment. In the litigation, plaintiffs sought to obtain the U.S. Air Force's official accident investigation reports, as well as other material, but the Government objected, claiming that the release of the requested documents would jeopardize national security[482]. After identifying some formal requirements for the invocation of the state secrets privilege[483], the majority opinion in *Reynolds*, delivered by Chief Justice Vinson, addressed the substance of the privilege, which is considered "well established in the law of evidence."[484] According to the opinion, documents and information a plaintiff requires access to may not be disclosed and not even be examined *in camera* whenever the court detects "a reasonable danger" that ordering the production of the sought material "will expose military matters which, in the interest of national security, should not be divulged."[485] In particular, should information concerning the classified equipment the B-29 aircraft was bearing be disclosed, national security could reasonably be expected to be damaged. The internal accident investigation report, therefore, may not be released in litigation, since there was "a reasonable danger" that such report would contain references to the classified equipment that was being tested when the crash occurred[486]. The Supreme Court, however, just assumes that the report contain such information[487]. As Chesney has observed, the Vinson opinion applied the "reasonably danger" standard to determine not only "how security-sensitive" documents and information must be to be protected from disclosure – and thus to be privileged – but also whether the judge should conduct *in camera* examination of such documents and information[488]. Chesney underlines "the folly" of using such a standard especially as to the former aspect. Today that the accident investigation report is of public domain, it is known that it did not actually contain information pertaining to the classified equipment of the aircraft that crashed. Had the Supreme Court permitted the

[482] *Reynolds*, 345 U.S., at 5.

[483] See, in particular, id., at 7-8 (contending that it is requisite a formal claim of the privilege, filed by the head of the department "which has control over the matter, after actual personal consideration by that officer.") (internal quotations omitted).

[484] Id., at 6-7.

[485] Id., at 10.

[486] Ibid.

[487] See CHESNEY, *State Secrets and the Limits of National Security Litigation*, supra note 21, at 1287. See also LOUIS FISHER, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case*, xi (University Press of Kansas, Lawrence, 2006) (noting that the report, when was eventually declassified, revealed that "[it] contained nothing that could be called state secrets.")

[488] CHESNEY, ibid.

district judge to engage in an *in camera* inspection of the report – the Author continues – the lack of any classified information in the report on the accident would probably have been discovered[489]. The key message *Reynolds* conveys is that judges should adopt a deferential approach when the state secrets privilege is invoked by the executive branch in the national security domain[490]. However, it has been noted that the Court of Appeals for the District of Columbia usually engages in thorough examination before recognizing the legitimacy of the state secrets privilege[491].

Scholars have debated as to whether there was some change in the usage of the state secrets privilege under the George W. Bush administration. Firstly, it has been pointed out that overall, the application of the privilege was increasingly claimed beginning from the late 1970s[492]. Secondly – and this is the heart of the debate – some scholars have argued that not only did the Bush administration raise the claim of the privilege with greater frequency than previous administrations, but it also changed the purpose of the claim. In the past, he state secrets privilege – those scholars contend – served above all the purpose to restrict the documents that could be used as evidence in litigation, while under the Bush administration, it was "invoked as grounds for dismissal of entire lawsuits."[493] Chesney objects to such a reconstruction[494], but his position appears to be isolated[495]. As the Fourth Circuit observed

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[489] Id., at 1288.

[490] See PALLITTO – WEAVER, *Presidential Secrecy and the Law*, supra note 86, at 98 (arguing that the "clear message of the Reynolds ruling is that courts are to show utmost deference to executive assertions of privilege.") See also FISHER, *In the Name of National Security*, supra note 487, at 257 ("What Reynolds did was to send an ominous signal that in matters of national security, the judiciary is willing to fold its tent and join the executive branch.").

[491] See CARRIE N. LYONS, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 Lewis & Clark L. Rev. 99, 107 and note 57 (2007).

[492] See FROST, *The State Secrets Privilege and Separation of Powers*, supra note 478, at 1938; CHESNEY, *State Secrets* and the Limits of *National Security Litigation*, supra note 21, at Appendix, 1315-1332; PALLITTO – WEAVER, *Presidential Secrecy and the Law*, supra note 86, at 101-102.

[493] FROST, id., at 1939. See also FISHER, *In the Name of National Security*, supra note 487, at 212, 245; PALLITTO – WEAVER, id., at 109; SHAYANA KADIDAL, *The State Secrets Privilege and Executive Misconduct*, JURIST Forum (May 30, 2006), available at https://www.ccrjustice.org/sites/default/files/assets/files/NSA_06.08.22_Jurist.pdf. Judicial practice of dismissing cases based on the state secrets privilege, however, already existed before the Bush administration. See KINKOPF, *The State Secrets Problem*, supra note 473, at 490-491 note 14.

[494] See CHESNEY, *State Secrets and the Limits of National Security Litigation*, supra note 21, at 50-52 (arguing that an analysis of case law leads to concluding that the Bush Administration's assertion of the state secrets privilege turns out to be consistent with past practice).

[495] See FROST, *The State Secrets Privilege and Separation of Powers*, supra note 478, at 1939-1940 (explaining why Chesney's interpretation of the usage of the privilege after 9/11 is not tenable). For

in *EI-Masri v. United States*[496], a court will dismiss a case by applying the state secrets privilege if "the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."[497]

c. The Secrecy of Grand Jury Proceedings

Grand juries, expressly mentioned in the Fifth Amendment of the Constitution[498], represent a typical U.S. instrument, which is supposed to act as an independent check on sufficiency of government allegations for a criminal trial. It lays on federal prosecutors, indeed, the burden to convince a body of persons – composed of a varying number of members (sixteen to twenty-three)[499] – that the evidence prosecutors themselves have collected on behalf of the Government is sufficient to initiate a criminal trial against a suspect. Jurors are citizens, whose service on a grand jury, as Fisher has argued, allows them "to participate in government decisions, understand [such decisions], and check abusive, politically driven prosecutors."[500] Therefore, by participating in a grand jury – the Author continues – citizens are granted a chance to contribute "to prevent[ing] the government's use of arbitrary power" to try alleged suspects[501]. Only if a majority of jurors considers the presented evidence to be sufficient, the grand jury may indict[502] someone of a federal crime, thereby formulating a charge that is tantamount to a recommendation that such a person be brought to trial.

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a list of scholarly positions commenting on the assertion of the state secrets privilege under the Bush administration, see LAURA K. DONOHUE, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 79-80 note 6 (2010).

[496] 479 F.3d 296 (4th Cir. 2007).

[497] Id., at 308.

[498] The Fifth Amendment provides, "No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger […]."

[499] Federal Rules of Criminal Procedure [hereinafter – Fed.R.Crim.P.], Title III, Rule 6(a)(1).

[500] LOUIS FISHER, *The Constitution and 9/11*: *Recurring Threats to America's Freedom*, 11 (Lawrence: University Press of Kansas, 2008).

[501] Ibid.

[502] The Fifth Amendment distinguishes "presentment" from "indictment." No elements can be deduced from the text of the provision, however, to identify what the difference between those terms consists in. Corwin has noted that whereas "[a] presentment is returned upon the initiative of the grand jury [,] an indictment is returned upon evidence laid before that body by the public prosecutor." EDWARD S. CORWIN, *The Constitution and What It Means Today*, 208-209 (11th ed., Princeton University Press, Princeton, New Jersey, 1954).

Grand jury proceedings feature a high level of secrecy, which is even higher with respect to deliberations and voting. Rule 6(e)(1) Fed.R.Crim.P., indeed, prescribes that all proceedings carried out by a grand jury be recorded by a court reporter or by a recording device, except for deliberations and voting. In a 1983 decision – *United States v. Sells Engineering*[503] – the Supreme Court provided a series of justifications for "[the] long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts."[504] Firstly, the secrecy of grand jury proceedings may prompt "many prospective witnesses" to consent to testify, since those witnesses may rely on the fact that their testimony will not be disclosed[505]. Secondly, secrecy promotes complete, frank testimony, an argument that is closely related to the first one. Thirdly, if grand jury proceedings were totally accessible, the suspects could try to alter the voting operations. Finally, secrecy safeguards the privacy of persons who are accused but then exonerated by the grand jury, as they "will not be held up to public ridicule."[506] Rule 6(e)(3), however, establishes some exceptions to grand jury secrecy for purposes of cooperation within the Federal Government. Under Rule 6(e)(3)(D), for instance, a government attorney is allowed to disclose grand jury material concerning foreign intelligence, counterintelligence, or foreign intelligence information[507] to any federal law enforcement official or to personnel from the Intelligence Community "to assist the official receiving the information in the performance of that official's duties." A government attorney may also disclose to appropriate U.S. federal or state officials grand jury material that is concerned with a threat of attack posed by a foreign power, or a threat of domestic or international sabotage or terrorism, or abusive intelligence gathering activities by a foreign power "for the purpose of preventing or responding to such threat or activities." The federal or state officials receiving such information have to use it in conformity with the guidelines issued by the Attorney General and the Director of National Intelligence thereof[508]. Furthermore, Rule 6(e)(6) prescribes that records, orders, and subpoenas related to grand jury proceedings be kept sealed "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."

[503] 463 U.S. 418 (1983).
[504] Id., at 424 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)).
[505] Ibid. (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)).
[506] Ibid. (quoting *Douglas*, 441 U.S., at 219).
[507] Rule 6(e)(3)(D)(iii) defines in detail what the term "foreign intelligence information" embraces.
[508] Rule 6(e)(3)(D)(i).

Finally, Rule 6(e)(7) provides that any violation of Rule 6 or of relevant guidelines may entail the sanction consisting in the contempt of court.

As Fisher has pointed out by mentioning an affair that occurred under the George W. Bush administration[509], a grand jury investigation may also result in bringing to light the improper classification of one or more documents. The affair may be summed up as follows. On November 20, 2006, a U.S. Attorney for the Southern District of New York issues a grand jury subpoena to the American Civil Liberties Union (ACLU), a non-profit organization, whose stated mission is to protect individual rights and liberties guaranteed on U.S. soil by the Constitution and by the laws of the United States. By issuing the subpoena, the Government requests "any and all copies"[510] of a 2005 document in possession of the ACLU, which is classified as "Secret." The ACLU challenges the subpoena by claiming not only that a grand jury do not have authority to request all copies of a given document, but also that the subpoena violates the ACLU's First Amendment rights[511]. The government, in turn, claims that its authority to formulate the request derives from sections 793 and 798 of Title 18, U.S. Code, concerning espionage[512]. On December 11, 2006, a district judge holds a closed-door hearing, aimed at examining the Government's request for all copies of the classified document mentioned above. At the close of the hearing, the judge orders that all documents pertaining to the case remain sealed, even though the ACLU is free to make publicly any comments. The proceeding goes on, and the Government explains that the aim of the grand jury is to investigate the leaking to the ACLU of the classified document at issue, which the ACLU deem "to be of interest to it and to the public."[513] According to the ACLU, the application of the "Secret" marking to the document represents a "striking, yet typical, example of over-classification."[514] On December 18, U.S. Attorney Michael J. Garcia informs the district judge of the Government's intention to withdraw the subpoena,

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[509] FISHER, *The Constitution and 9/*11, supra note 500, at 44-49.

[510] Grand Jury Subpoena 0108, subpoena to the ACLU, signed by U.S. Attorney Micheal J. Garcia and Assistant U.S. Attorney Jennifer G. Rodgers, Southern District of New York, November 20, 2006.

[511] The ACLU considers the issuing of the subpoena as merely "an improper confiscatory, information-suppressive" operation. Memorandum of Law in Support of the ACLU's Motion to Quash. In re Grand Gury Subpoena Served on the American Cicil Liberties Union (December 11, 2006) p. 13.

[512] Id., at 5.

[513] Ibid.

[514] FISHER, *The Constitution and 9/*11, supra note 500, at 46, note 103 (quoting an e-mail from Paul McMasters, Freedom Forum (December 13, 2006)).

and reports that the document at issue has been declassified. Accordingly, the judge directs that all records related to the document be made available to the public[515]. Fischer has contended that this affair "offers a glowing example of a document that should never have been classified at any level, much less 'Secret.'"[516] Since the document sets forth guidelines for taking pictures of enemy prisoners of war and detainees, the Author continues, "[t]he evident purpose in drafting and disseminating the document was to avoid the type of embarrassing publicity associated with photos of Abu Ghraib prisoners in Iraq."[517] Fischer has concluded that there existed no legal grounds for classifying the document[518]. The affair demonstrates that secrecy is a general matter that goes through the whole legal system. In this case, the classification level of a given document, thus a typical administrative measure, was affected by a grand jury proceeding. This proceeding, aimed at analyzing the evidence for a criminal trial pursuant to the Espionage Act of 1917, eventually led to the declassification of the document.

d. Military Commissions

Military commissions are shrouded in a veil of secrecy. The United States has a long-standing tradition of military commissions or courts as an extraordinary means to cope with wartime conditions[519]. The terrorist attacks of September 11, 2001 on U.S. soil prompted President Bush to order the creation of military commissions, designed to try terrorist

[515] Order, In re Grand Jury Subpoena Served on the American Civil Liberties Union, M11-188 (JSR), Judge Jed S. Rakoff, U.S. District Court, Southern District of New York (December 18, 2006).
[516] FISHER, *The Constitution and 9/*11, supra note 500, at 47.
[517] Id., at 47-48.
[518] Id., at 48. Fischer has underlined that none of the categories of classified material defined by the then-effective Executive Order No. 13,292, enacted by President Bush, could be interpreted so broadly as to encompass the taking of photos of enemy prisoners of war or detainees. Id. See Exec. Order No. 13,292 – "Further Amendment to Executive Order 12958, as Amended, Classified National Security Information", 68 Fed. Reg. 15315 (March 25, 2003).
[519] See ORI ARONSON, *In/visible courts: military tribunals as other spaces*, in COLE et al. (eds.), *Secrecy, National Security, and the Vindication of Constitutional Law*, supra note 131, at 232 (noting that the practice by the U.S. Government of establishing military commissions to tackle emergency situations, usually related to wartime or to the aftermath of a war, "dates back to the eighteenth century.") See also DAVID B. RIVKIN, JR. – LEE A. CASEY, *The Use of Military Commissions in the War on Terror*, 24 Boston U. Int. L. J. 123, 123 (2006) (pointing out that military commissions have been "an integral part of the American legal tradition since the War for Independence.")

suspects that American authorities would apprehend in the course of the war on terror[520]. A few years later, Congress passed specific legislation on military commissions[521], which was in part declared unconstitutional by the Supreme Court over time for undue deprivation of detainee rights[522]. Military commissions have been located ever since within the Guantanamo Bay Detention Camp, in Cuba, and thus "essentially away from the public eye."[523] Aronson has observed that such commissions "are not secret courts in the formal sense,"[524] as civilian attorneys in possession of special security clearances may provide the accused with legal defense[525], and the press is generally recognized the right of access to court proceedings. Section 949d(c) of Title 10, U.S. Code, governs the closure of proceedings. The military judge is empowered to prescribe that all or part of military commission proceedings be closed to the public, provided that he or she offers a specific finding that such a closure is necessary to protect information, "the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities."[526] The sealing of proceedings is also allowed when it is ordered in the interest of the physical safety of individuals[527]. Furthermore, it has been noted that military court opinions should always be available online, though in reality they are published in official websites "only sporadically."[528]

Aronson has defined military commissions as "semi-secret courts," for they were designed to reduce "their transparency and publicity, as well as the assurance of full accessibility to evidence relevant to a defendant's defense."[529] Therefore, the right to be tried in open court, a typical right of a democratic legal system, turns out to be seriously restricted for those who are tried by military commissions. Not only are terrorist suspects deprived of

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[520] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

[521] Military Commission Act of 2006 ("An Act to authorize trial by military commission for violations of the law of war, and for other purposes."), Pub. L. 109-366, 120 Stat. 2600 (October 17, 2006), codified at 10 U.S.C. §§ 948a et seqq.

[522] See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and – above all – *Boumediene v. Bush*, 553 U.S. 723 (2008).

[523] ARONSON, *In/visible courts*, supra note 519, ibid.

[524] Ibid.

[525] 10 U.S.C. § 949c(b)(3). See DAVID LUBAN, *Lawfare and Legal Ethics in Guantanamo*, 60 Stan. L. Rev. 1981, 1989-92 (2008).

[526] 10 U.S.C. § 949c(2)(A).

[527] Section 949c(2)(B).

[528] ARONSON, *In/visible courts*, supra note 519, at 235.

[529] Ibid.

some basic human rights, but they are also tried in distinct fora, tailor-made for alleged enemy combatants. Resnik has maintained that "[w]hen cases proceed in public, courts institutionalize democracy's claim to impose constraints on state power."[530] Open court proceedings – the Author explains – are requisite for "participatory parity," since the parties to a trial tend to interact with each other, and in doing so, they perceive themselves as equals[531]. Such equality among the parties is ensured by openness of proceedings, insofar as any restriction to the equality of the parties may be decried. In that sense, courts end up being "potentially egalitarian political venues […]."[532] After 9/11, the executive branch promoted the enactment of legislation that sought to keep military commission proceedings as far as possible from public scrutiny. The Executive – Resnik notes – intended to establish "a separate 'tribunal system' for alleged enemy combatants [that was] aimed at controlling access and information as well as limiting the rights of detainees by augmenting the powers of the state."[533] Resnik has even gone so far as to question the propriety of the phrase "closed military courts."[534] Indeed, she has defined such a phrase as an "oxymoron," since a court is always a public institution[535], and referring the concept of secrecy to a court means to thwart the close connection "between openness and adjudicatory processes."[536] Open court proceedings[537] also entail the need to ensure the publication of court opinions: As Resnik

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[530] JUDITH RESNIK, *Courts: In and Out of Sight, Site, and Cite*, 53 Vill. L. Rev. 771, 807 (2008). To further prove her point, the Author quotes Bentham's maxim according to which "[p]ublicity is the very soul of justice […] It keeps the judge himself, while trying, under trial." Ibid. (quoting JEREMY BENTHAM, Chapter X, *Of Publicity and Privacy, as Applied to Judicature in General, and to the Collection of the Evidence in Particular*, in 6 *The Works of Jeremy Bentham*, 351, 355 (William Tait, 1843)).

[531] RESNIK, *Courts: In and Out of Sight*, id., at 807.

[532] Ibid.

[533] Id., at 808.

[534] JUDITH RESNIK, *Bring Back Bentham: 'Open Courts,' 'Terror Trials,' and Public Sphere(s)*, 5 L. & Ethics Hum. Rts. 2, 4 (2011).

[535] Resnik, indeed, has contended that courts "are one avenue through which private persons come together to form a public, assuming an identity as participants acting within a political and social order." Id., at 30.

[536] Id., at 4. As she already did previously (see, supra note 515), the Author recalls the political philosophy of Jeremy Bentham, who was an advocate of publicity, a concept that implied the chance for the public to conduct in many venues "scrutiny of various actors and institutions – judges and courts, included." Ibid. She also points out that according to Bentham, the guarantee of openness in judicial proceedings was one of the "methods for transferring authority to the public, [thereby] forming a 'tribunal' whose opinions were to influence ruling powers." Ibid.

[537] Id., at 30 (observing that open court proceedings "enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.")

herself has argued, "[o]pen courts and published opinions permit individuals who are neither employees of the courts nor disputants to learn, firsthand, about processes and outcomes."[538] Accordingly, Aronson has correctly pointed out that the principles of openness, visibility, publicity, and accessibility of court proceedings are not only "essentials of dignified treatment" of people in a rule-of-law system, but also "instruments for ensuring fair, legitimate and accountable use of judicial power […]."[539]

Aronson has also argued that while from the outset, the U.S. Government intended to set the military commissions aimed at trying terrorist suspects apart from the remainder of the judicial system in order to prevent public scrutiny over those commissions, such a policy ended up producing the opposite effect of arousing the interest of Americans. The Author starts off by referring to the concept of "heterotopia," elaborated by Foucault in 1967 to embrace what a given society considers its "*other*" in any respect[540]. The spaces a society designs to be isolated, on the contrary, show proclivity to catching the attention of the public for the very reason that they are devised to differ from what is ordinary[541]. Aronson has pointed out that the military commissions the Government established in the post-9/11 era – especially, the court at the Guantanamo Bay Detention Camp – fully embody heterotopias as meant by Foucault. Such tribunals, indeed, consist in "secluded facilities with complex systems regulating entry and exit [and] reside in distant locations […]."[542] Whereas they are shrouded in mystery, the military courts tend to be perceived as a sort of acid test to figure out the ability of the U.S. society to deal with dangerous threats without failing in the basic values of that society[543]. Aronson has argued that on the one hand, military commissions lack the high degree of visibility that features ordinary courts; on the other hand, the "very

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[538] Ibid.

[539] ARONSON, *In/visible courts*, supra note 519, at 236.

[540] Id., at 237 (italics in original) (referring to MICHAEL FOUCAULT, *Of Other Spaces*, 16 Diacritics 22 (1986) (Jay Miskowiec trans.). According to Foucault, heterotopias "are locations that […] reside under a constant regime of 'opening and closing that both isolates them and makes them penetrable.'" Ibid. (quoting FOUCAULT, id., at 26).

[541] ARONSON, id., at 237-238 (maintaining that heterotopias "are designed to be invisible and unmentionable, but by differentiating them from our regular lives we make sure that we know where they are, and in what ways they are distinct from that which is 'normal.'")

[542] Id., at 238.

[543] Ibid. (arguing that in consideration of their restrictions to the traditional principle of open judicial proceedings, the military commissions "are singled out as the *other* kind of forum by which to measure and test a political community's constitutional convictions and political inhibitions." (italics in original).

otherness [of the former] provides a different kind of visibility […]."[544] Even though military tribunals were designed to benefit the secrecy they are wrapped in, the very existence of separate fora targeting suspect terrorists makes them "more noticeable [than ordinary courts] and thus more readily subject to review and critique."[545] To put it differently, the U.S. Government's decision to have suspect terrorists tried not before civilian courts but before special courts that do not apply the ordinary rule of openness resulted in directing the attention of the press, of scholars, and of the public in general at military tribunals. As Aronson has observed, the "separate institutional setting for trying terrorism suspects necessarily invokes special awareness and [public] scrutiny."[546] The Author concludes that in such a case, secrecy turns out to be "a political *device*, grounded in social practices of exclusion, distinction, and taboo."[547] Despite a low level of transparency, therefore, military commissions tend to attract the public's eyes because of their exceptional function and separate location.

C. Access to Criminal Trials and Relative Records

As I briefly mentioned above, the Supreme Court has gradually recognized that the First Amendment of the U.S. Constitution underpins – *inter alia* – a right of access to court proceedings since the holding rendered in *Richmond Newspapers, Inc. v. Virginia*[548]. In that case, the right of access to a criminal trial was denied both to the press and to the public. According to the Supreme Court majority opinion, delivered by Chief Justice Burger, the trial court did not provide proper justification for depriving the press and the public of their First Amendment right to gain access to criminal trial proceedings[549], a right that – Burger underlines – was historically guaranteed in the United States[550]. *Richmond* turns out to be a watershed case, as Justice Stevens pointed out in a concurring opinion[551]. He puts emphasis on the fact that for the first time, the Supreme Court substantially acknowledges the constitutional foundation of a right of the press to gather news, and of a right of the public

[544] Ibid. (italics in original).
[545] Id., at 239.
[546] Id.
[547] Id., at 246 (italics in original).
[548] *Richmond*, 448 U.S., supra note 449.
[549] Id., at 580.
[550] Id., at 564-574.
[551] Id., at 582.

to gain access to government-held information[552]. In his concurring opinion, Justice Brennan, instead, stresses the need for a balance that the court is always supposed to strike between the people's right to gather information from the government and other involved interests[553]. Therefore, the right to know and to gain access to the court proceedings may outweigh other interests only if the judge holds so on a case-by-case analysis. Justice Brennan concludes that, whether the right at issue is meant as the right to gain access to the courtroom and to relevant records or the right to gather government information in general, "what is crucial in individual cases is whether access to a particular government process is important in terms of that very process."[554] The Supreme Court addressed again accessibility to criminal court proceedings in a 1982 case, which would become another milestone in the field – *Globe Newspaper Co. v. Superior Court*[555]. The case was concerned with alleged sexual offenses committed against three minors, and the presiding judge issued an order prescribing the exclusion of the public from the courtroom in conformity with Massachusetts statute law. The core of the holding goes in the same direction as Richmond: the closure of the courtroom to anyone not directly involved in the process results in violating the press' and the public's First Amendment right to access to criminal trials[556]. The majority opinion emphasizes the cardinal role that the principle of openness plays in criminal trials as a guarantee that the fact-finding be carried out correctly and the rights of the accused be respected, because the court proceedings are subject to the supervision of the public[557]. Despite meeting limits in its application[558], the principle of openness in criminal trials is deemed to "foste[r] an appearance of fairness, thereby heightening public respect for the judicial process."[559] The majority opinion also argues that "public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an

[552] Id., at 582-584.

[553] Id., at 588 (Brennan, J., concurring) ("An assertion of the prerogative to gather information must […] be assayed by considering the information sought and the opposing interests invaded.")

[554] Id., at 589.

[555] 457 U.S. 596 (1982).

[556] Id., at 602.

[557] Id., at 606 (contending that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.")

[558] Id., at 606-607. The press and the public may be denied access to the courtroom and to relevant records if "a compelling governmental interest" requires keeping the court proceedings confidential, provided that the closure of the court "is narrowly tailored to serve that interest." Id., at 607.

[559] Id., at 606.

essential component in our structure of self-government."[560] Since access to the courtroom and to court proceedings records ends up being the means by which public scrutiny is exercised over the conduct of trials, courts are allowed to deny the right of access to the press and the public only if there exists no reasonable alternative to closure to safeguard a compelling interest that also enjoys constitutional coverage[561].

Considering that access to trials and relative records enables public scrutiny, courts may exclude such access if a few procedural requirements, identified especially by the Supreme Court and by the Second and Forth court of appeals circuits with respect to criminal trials, are met. A court that intends to close – totally or partially – a trial or to seal the relevant records has to comply with a series of procedures, which are "prerequisites" for legitimate denial of the press' and the public's right of access to courtroom and to trial records[562]. The first procedural requirement prescribes that the court decision to opt for a closed-door trial be subject to "[s]ome form of public notice," to potentially afford anyone an opportunity to challenge such a decision[563]. The second requirement consists in devoting a public hearing to discussion over the propriety and lawfulness of closing the trial. Those who claim that their right of access to court proceedings has been unduly violated are supposed to be given a chance to argue the closure issue "in open court."[564] Finally, under the third requirement, a court deciding to close a trial and keep the relevant records confidential has to set forth the reasons for the closure of its proceedings on the record in a rather detailed fashion[565].

The courts are to follow those procedural requirements "even, and perhaps especially," in cases involving espionage, where the closure of trial proceedings is justified with the need to preserve either the security of the country or the identity of foreign

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[560] Ibid.

[561] ADAM LIPTAK, Symposium – *Comment*, 9 J.L. & Pol'y 21, 21-22 (2000) (referring to *Press-Enterprise v. Superior Court*, 478 U.S. 1, 14 (1986); *Press-Enterprise v. Superior Court* [hereinafter – *Press-Enterprise I*], 464 U.S. 501, 510 (1984); *Richmond*, supra note, at 581).

[562] *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984).

[563] *In re Herald Co.*, 734 F.2d 93, 102 (2th Cir. 1984).

[564] *United States v. Cojab*, 996 F.2d 1404, 1408 (2nd Cir. 1993). The Court of Appeals for the Second Circuit, indeed, prescribed that the district court order to exclude the public from accessing the Cojab hearing records be vacated, for such an order was issued not in open court but separately.

[565] See *In re Knight Publishing*, 743 F.2d, at 234 (ruling that "[i]f the district court believes it necessary to close the courtroom after hearing the objections, it must state its reasons on the record, supported by specific findings.") Those findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enterprise I, 464 U.S., at 510.

informants[566]. In 1986, the Fourth Circuit found itself judging one of such cases – In re Washington Post Company[567]. The case involves a Ghanaian national that is accused of espionage for having received from a low-level CIA employee classified information concerning essentially the identity of covert personnel working for the U.S. Government in Ghana. The Washington Post Company asks the Court of Appeals to vacate orders by which a district court has prescribed the closure of portions of a criminal trial, and the sealing of related documents. The district court, in particular, has denied to the public the right of access to plea and sentencing hearings. Those interested in attending the trial have not been provided any chance to challenge the court secrecy. The idea underlying the closure is that granting the general public access to the trial and to relevant documents could thwart the confidentiality of the content of certain intelligence information. The Fourth Circuit, however, observes that under no circumstances would a public hearing on closure have resulted in disseminating the sensitive information involved in the trial[568]. To put it differently, an open discussion on the propriety and legitimacy of sealing court proceedings and relevant documents has nothing to do with the contents of the trial, as the substance of the proceedings is kept out of the discussion. Therefore, even if national security concerns are involved in the trial, as is indeed the case with In re Washington Post Company, granting the public an actual chance to challenge the decision of closing the court proceedings does not affect the assessment of such concerns, nor the way of coping with them. Since considering the issue of forbidding public access to the courtroom does not ensue dissemination of the classified information the trial may be concerned with, the Fourth Circuit observes, the procedural requirements previously mentioned "are fully applicable in the context of closure motions based on threats to national security."[569] The Fourth Circuit also argues that if courts were to fail to enforce the procedural requirements for the closure of proceedings whenever classified or otherwise sensitive information are involved in a case,

[566] LIPTAK, *Comment*, supra note 561, at 26.

[567] *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).

[568] Id., at 391 (contending that "[t]here is no reason to fear that these procedures [instrumental to the lawful closure of court proceedings] would in themselves alert the public to the substance of the information sought to be kept secret.")

[569] Id., at 392.

the independent position of the judicial branch would be undermined by complete deference to the Executive[570].

D. The Classified Information Procedures Act (CIPA)

The Classified Information Procedures Act (CIPA), enacted on October 15, 1980,[571] and codified as Appendix to Title 18 of the U.S. Code[572], lays down rules and procedures aimed at solving the conflict between secrecy and due process requirements in criminal litigation involving the use and thus the potential disclosure of classified information. As the Fourth Circuit noted in 1985, Congress enacted CIPA to tackle the growing usage of the practice known as greymail, whereby a criminal defendant relies on the deterrent effect that the threat of divulging classified information during the trial may generate[573]. The aim a defendant seeks to achieve by deploying such a practice is to prompt the government to drop the charges out of fear of the inappropriate dissemination of such classified information. CIPA has been characterized as "a procedural statute,"[574] as its cardinal purpose is to establish procedures for the deliberation on admissibility of evidence that consists of classified information[575]. Such procedures, however, do not replace ordinary standards for assessing relevance and admissibility of evidence into a trial[576]. They are aimed, instead, at

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[570] Id. ("A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.")

[571] Pub. L. 96-456, 94 Stat. 2025 (1980).

[572] 18 U.S.C. App. III, Sections 1-16.

[573] *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985).

[574] DEP'T OF JUSTICE – OFFICES OF THE U.S. ATTORNEYS, *Criminal Resource Manual 2001-2099, 2054.Synopsis of Classified Information Procedures Act (CIPA)*, available at http://www.justice.gov/usam/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa (retrieved: February 18, 2016).

[575] See S. Rept. No. 823, 96th Cong., 2nd Sess., p. 1, reprinted in 1980 U.S. Code Cong. & Admin. News, p. 4294 (quoted in *United States of America v. Richard Craig Smith*, 750 F.2d 1215 (4th Cir. 1984)) (explaining that the purpose of the CIPA is to establish "pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court.") By following those procedures – the Senate report continues -- the U.S. Government will be able "to ascertain the potential damage to national security of proceeding with a given prosecution before trial." Ibid.

[576] See, e.g. *United States v. Wilson*, 750 F.2d 7 (2d Cir.1984); *United States v. Wilson*, 732 F.2d 404 (5th Cir.), cert. denied, 469 U.S. 1099 (1984). See, also, *Smith*, 780 F.2d, at 1106 (pointing out that "[t]he legislative history is clear that Congress did not intend to alter the existing law governing the

ensuring a balance between the defense attorney's freedom to choose how to manage defense and the government's right to evaluate in advance the impact that the disclosure of classified information in the course of the trial would have[577]. Section 1(a) CIPA defines "[c]lassified information" as any information or material that "require[s] protection against unauthorized disclosure for reasons of national security […]." It is incumbent on the Federal Government, "pursuant to an Executive order, statute, or regulation," to determine what information or material needs such a protection. Paragraph (b) clarifies that "national security" includes the fields of national defense and foreign relations of the United States. The means that prevents inappropriate disclosure of classified information is a protective order, which the district court is supposed to issue[578]. Such an order have two purposes: to restrict access to the classified material involved in the trial to cleared persons – i.e., persons who have been granted a security clearance – other than to the judge and the defendant; and to protect the classified information – as the name of the order suggests – by establishing procedures for the handling of such information.

Sections 5 and 6 lay down the core of CIPA procedures. Under Section 5(a), a defendant, who intends to disclose classified information either directly or indirectly[579], has to afford the court and the Government timely pretrial written notice of her intention thereof. The notice must provide a description of the classified information the defendant intends to divulge. The Eleventh Circuit clarified the prescription just mentioned by holding, in 1983, that the notice "must be particularized, setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense."[580] If the notice is not sufficiently detailed, Section 5(b) imposes a specific sanction on the defendant: he or she

admissibility of evidence.") Such a decision also cited an excerpt from the Conference Report on the CIPA that reads as follows: "[T]he conferees agree that […] nothing in the conference substitute is intended to change the existing standards for determining relevance and admissibility [of evidence]." H. Conf. Rept. No. 96-1436, 96th Cong., 2d Sess. (1980), p. 12, reprinted in U.S.Code, Cong. & Adm.News, p. 4307, 4310 (quoted in *Smith*, id.).

[577] *See, e.g., United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir.), *cert. denied*, 493 U.S. 1004 (1989); *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983); *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1407 (S.D.Fla. 1990). Accordingly, it has been noted that CIPA provisions are aimed not only at "preventing unnecessary or inadvertent disclosures of classified information [, but also at] advising the government of the national security 'cost' of going forward." DEP'T OF JUSTICE – OFFICES OF THE U.S. ATTORNEYS, *Criminal Resource Manual*, supra note 574, ibid.

[578] Section 3 CIPA.

[579] The disclosure of classified information is considered indirect when it is caused by the conduct of the defendant in any trial or pretrial proceeding, but not accomplished by the defendant herself.

[580] *United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir. 1983).

may not disclose the classified information. Furthermore, Section 6(a) provides that at request by the U.S. Government, the court is supposed to conduct a hearing "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." Such a hearing is held *in camera*, i.e., in private chambers or – in any event – with exclusion of the public, if the Attorney General of the United States certifies that a public hearing "may result in the disclosure of classified information." Comparing the degree of deference that courts tend to accord to the executive branch when dealing with the withholding of classified information within three different systems – the CIPA, for criminal cases; the FOIA, for cases concerning access to agency records; the state secret privilege, which applies in civil suits – Schulhofer has argued that in the CIPA, "adversary procedures for the review of executive-brach secrecy are at their height […]."[581] According to the Author, indeed, experience shows that by the power vested in them by the CIPA, U.S. courts exercise "active oversight of classification decisions" on a regular basis[582].

[581] STEPHEN SCHULHOFER, *Oversight of national security secrecy in the United States*, in COLE et al. (eds.), *Secrecy, National Security, and the Vindication of Constitutional Law*, supra note 131, at 22.

[582] Id., at 23.

CHAPTER 3

THE HEART OF THE ISSUE: TRANSPARENCY AND SECRECY IN THE EXECUTIVE BRANCH

I. Executive Privilege

A. Executive Privilege According to Berger: "A Constitutional Myth"

Berger is the most fervent critic of executive privilege, which he has defined as "a constitutional myth."[583] Fisher observes that since Berger does not specify the acceptation of the term he calls upon, it is possible to argue that he refers to the traditional meaning of "myth," the meaning provided by dictionaries[584]. If such an assertion is correct – and, indeed, there is no reason to think otherwise – it is rather evident that Berger's intent is to emphasize his aversion to the advocates of executive privilege. The privilege has been analyzed by each of the three branches of the Federal Government, other than by numerous scholars, and it is hard to believe that so much effort has been directed at something that is just based on "fiction and imagination," to such an extent that those who claim the existence of this institution may be considered "guilty of a falsehood."[585] Berger, therefore, deploys provocative language, of which there is confirmation in his book. Indeed, he clarifies that the myth of executive privilege has been molded by invoking "newly-minded, self-serving precedents [and by] crystal-glazing […]."[586] In other words, the advocates of the privilege – Berger observes -- have deliberately provided a misrepresentation of American history to lay the foundations of an institution they claim the Federal Executive has always depended on, and always will. In his opinion, no evidence of the existence of the privilege can be found in American history, for such a privilege has been artificially created, mostly in academic and bureaucratic milieus. By adopting an extremely narrow interpretation of the U.S. Constitution, Berger deems presidential powers to consist only in such powers as are expressly vested in the President by Article II Const., since this was the intention of the

[583] RAOUL BERGER, *Executive Privilege: A Constitutional Myth* [hereinafter – *Executive Privilege*], 1 (MA, Harvard University Press, 1974).
[584] See LOUIS FISHER, *Raoul Berger on Public Law*, 8 Pol. Science Reviewer, 173, 199 (1978).
[585] Ibid.
[586] *Executive Privilege*, at 13.

Founding Fathers[587]. Executive privilege is not mentioned in the Constitution, and thus represents an implied power, a concept Berger repudiates[588].

To prove that executive privilege is not a legitimate power under the U.S. Constitution, Berger focuses his analysis on Congress's power of inquiry into the executive branch and into its conduct. Even Prakash, one of the few scholars in addition to Berger that question the existence of executive privilege, however, has observed that Berger gives too much prominence to Congress's power of inquiry, which he ends up identifying as "the central feature of [U.S.] government."[589] He finds that historically, the congressional oversight function turned out to be virtually absolute, as it covered "the whole spectrum of government […]."[590] As a result of the unlimited scope of this function, Berger argues, the executive branch does not enjoy any discretion to withholding information from Congress when the latter is carrying out an investigation. Berger, indeed, considers Congress as the ultimate source – and repository – of all powers of the Federal Government provided for by the Constitution. The legislative branch, therefore, is vested with supreme authority within the Government, and the power of inquire into the Executive and its administrative apparatus has a pivotal role.

Berger mostly relies upon British history to support his assertion that Congress's interest in disclosure always prevails over the interest of the executive branch in keeping certain information confidential, and deems such an approach to be fully consistent with the common law tradition the U.S. and the U.K. share[591]. He emphasizes, indeed, that the power of inquiry was long at the heart of parliamentary prerogatives in Britain, especially in the seventeenth century. In response to a scholar raising objections about his theory, Berger notes that in Britain, the Executive never refused to disclose information to the Parliament

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[587] Id., at 55 (maintaining that the Framers meant the presidential powers not to exceed the ones expressly "conferred and enumerated" in Article II Const.).

[588] See FISHER, *Raoul Berger on Public Law*, supra note 584, at 175-176 (stressing that Berger rejects "the notion of implied powers, inherent powers, powers derived from custom, or any other extra-constitutional power that is not expressly vested in one of the branches [of the Federal Government].")

[589] SAIKRISHNA B. PRAKASH, *A critical Comment on the Constitutionality of Executive Privilege*, 83 Minn. L. Rev. 1143, 1146 note 12 (1999).

[590] *Executive Privilege*, at 36-37.

[591] Id., at 42 (observing that "the Framers thought in terms of English institutions and employed common law terms.")

in the period from the first half of the seventeenth to the first half of the eighteenth century[592]. In his endeavor to prove that the Framers modeled the U.S. Congress upon the British Parliament, Berger also recalls a 1927 decision, *McGrain v. Daugherty*[593], wherein the Supreme Court looked to the British history in addressing the boundaries of Congress's power of inquiry[594]. Furthermore, Berger mentions an avalanche of episodes taken from Britain's constitutional history beginning from 1621 to show that it was never the case that the Crown and ministers could invoke a privilege to withhold information from the Parliament and therefore to avoid being accountable to the legislative power[595]. Berger notes that most of the times, inquiries conducted by the Parliament constituted "a prelude to impeachment,"[596] and it certainly is not a coincidence that he goes back to 1621 to pinpoint historical evidence supporting his theory, as at the time the British Parliament was showing "extraordinary zeal in searching out corruption of government and trade […]."[597] He documents parliamentary investigations that targeted any field of executive power activity, ranging from the war conduct[598] to the use of public money[599], and to the execution of laws[600]. Berger argues that from his research it can be inferred that even the sector of foreign affairs, "about which American presidents have drawn a curtain of secrecy,"[601] was fully subject to the parliamentary oversight power[602]. Overall, he deploys a series of precedents to conclude that in the British system of sovereign powers – and thus in the dynamics of that country's material constitution – the Parliament is the cardinal body of the State and nothing can escape its oversight power. Very fitting is the characterization of the British Parliament as "the Great Inquest of the Nation," made by a eighteen century's political leader – later to

[592] More precisely, the British Parliament was never denied access to information concerning the Crown and executive power – and thus to administrative records – between 1621 and 1742, except for an isolated episode occurred in 1742. See RAOUL BERGER, *Executive Privilege, Professor Rosenblum, and the Higher Criticism* [hereinafter – *Rosenblum and the Higher Criticism*], Duke L. J. 921, 923 (1975).
[593] 273 U.S. 135 (1927).
[594] BERGER, *Rosenblum and the Higher Criticism*, supra note 592, ibid.
[595] *Executive Privilege*, at 15-31.
[596] Id., at 15.
[597] Id., at 16 (quoting CATHERINE D. BOWEN, *The Lion and the Throne*, 435 (Boston, 1957)).
[598] Id., at 17-19.
[599] Id., at 19.
[600] Id., at 19-20.
[601] Id., at 21.
[602] Id., at 21-23.

become Prime Minister of Britain – whose statement Berger quotes indeed[603]. The power of impeachment affords Berger the main argument to build a theory that rules out any chance of finding limitations to the power of inquiry: Since the former has an absolute scope and thus embraces all executive functions with no exceptions, so must be the latter[604]. However, it would be reductive – the Author continues – to pinpoint the power of impeachment as the only element capable of justifying the vastness of the scope of parliamentary investigations. The British Parliament did not meet restrictions in inquiring into the Crown and the government, including the relevant administrative apparatus, because parliamentary investigations were aimed at achieving a plurality of purposes, as precedents show. The inexistence of a privilege – and of a margin of discretion – for the Executive to refuse to disclose information to the Parliament when the latter is carrying out an investigation – Berger maintains – "rests upon the fullest legislative supervision of administration, exhibited by inquiries into executive miscarriages, expenditures of public moneys, and execution of the laws, as a basis for legislation and the like."[605]

According to Berger, since the Framers took the British Parliament as model of inspiration when they devised the legislative branch of Federal Government, Congress enjoys an unfettered power to inquire into the executive branch, as its British counterpart does. There is no official evidence – he contends – that the Framers intended to establish any restrictions to the congressional power to conduct investigations over the executive branch[606]. The purview of constitutional provisions does not make any express reference to

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[603] Id., at 29 (drawing upon RICHARD CHANDLER, *13 History and Proceedings of Parliament from 1621 to the Present*, 172-173 (London, 1743) (statement of William Pitt the Elder – 1742) ("We are called the Great Inquest of the Nation, and as such it is our Duty to inquire into every Step of public Management, either Abroad or at Home, in order to see that nothing has been done amiss […].") See also BERGER, *Rosenblum and the Higher Criticism*, supra note 592, ibid. (quoting CHARLES DAVENANT, *Essays upon I. The Balance of Power. II. The Right of Making War, Peace, and Alliances. III. Universal Monarchy*, 208 (London, 1701) ("When they are [assembled in Parliament, the British representatives] are a part of the Legislative Authority, whose Business has always been to enquire into, and correct the Errors and Abuses committed by those upon whom the Prince has devolv'd any part of the Executive Power.")

[604] *Executive Privilege*, at 24 (arguing that "[j]ust as there exists no executive limit on the parliamentary power to impeach, so there can be no executive limit on the power of Parliament to *inquire* whether executive conduct amounts to impeachable misconduct.")

[605] Id., at 24.

[606] Id., at 35.

such restrictions[607]. The act passed by Congress on September 2, 1789 that established the U.S. Department of the Treasury[608] is given as further evidence that the Framers envisioned a legal system wherein the executive branch is supposed to ensure that any demand for information necessary for Congress to perform its oversight function be completely satisfied. Section 2 of the act imposed upon the Secretary of the Treasury – *inter alia* – the duty "to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office." According to Berger, therefore, championing the existence of executive privilege, of which there exists no trace in American history prior to the entry into force of the Constitution, means contradicting the Framers' intent[609].

In addition to referring to Congress's power of inquire into the executive branch, Berger deploys a series of other arguments to prove that executive privilege lacks any legal basis, especially by analyzing the powers expressly vested in the President of the United States by the Constitution. Firstly, Article II, Section 3, Clause 1, requires that the President "from time to time give to the Congress Information of the State of the Union." According to Berger, such a clause establishes a presidential duty to inform that is "the reciprocal of the familiar legislative power to inquire."[610] To put it differently, the duty of the President to provide Congress with periodic updates about the comprehensive situation of the Federal Government and the congressional oversight power over the executive branch end up being two sides of the same coin. Berger also notes that such a correspondence was less evident in the early version of the provision at issue, the one originally presented at the Constitutional Convention of 1787. It imposed on the President "[the] duty to inform the Legislature of the Constitution of the U.S. so far as may respect his Department."[611] Had such a version entered into force, the President would have been "placed under an unqualified duty to inform

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[607] See *Executive Privilege* – Hearing Before the Subcommittee On Separation of Powers of the Senate Committee on the Judiciary, 92nd Cong. 1st sess., 245 (1971) (statement of Raoul Berger) (pointing out that "there is no word in the Constitution that expresses any intention whatsoever to curtail […] the legislative power of investigations.")

[608] An Act to establish the Treasury Department, ch. 12 Statute I, 65, 1st Cong., 1st Sess. The act is currently codified at 31 U.S.C. § 331.

[609] BERGER, *Rosenblum and the Higher Criticism*, supra note 592, at 922 (contending that "pre-1789 history knows no such doctrine as executive privilege, and there is reason to believe that the Framers did not mean to create it.")

[610] *Executive Privilege*, at 38.

[611] Id., at 37 (quoting FARRAND, 2 *The Records of the Convention*, supra note 144, at 158).

Congress as to matters within the Executive Department."[612] The final version of the provision, instead – Berger observes – "represents a broadened and stylistically improved articulation of that duty [to inform the legislative branch of government]."[613]

Secondly, another case against executive privilege rests on the Take Care Clause. Under Article II, Section 3, Clause 5, Const., is is incumbent on the President "[to] take Care that the Laws be faithfully executed." The power to draft the statutes and thus to forge the system of legislative law is vested in Congress. Therefore, no branch or other body within the Federal Government – Berger maintains – has a more compelling interest in controlling that the Executive accurately implement the laws than the lawmaker itself, i.e., Congress[614].

Thirdly, Berger calls upon the provision for the impeachment of the President, contained in Article II, Section 4, to deny that the Executive have discretion in responding to Congress's requests for information. To sustain his point, the Author mentions nineteenth century reports of the House of Representatives. A first report, issued in 1843, points out that the House, which is the chamber empowered to carry out impeachment proceedings, is put into condition to conduct those proceedings only if it has boundless access to information held by the executive branch. The exercise of the impeachment power, therefore, would be practically hampered by the ability of the President and his staff to hold back information necessary for Congress to get a comprehensive picture of the situation that seems to undermine the loyalty of the President. If the President were to actually enjoy the ability to withhold information, the House could not conduct exhaustive investigations in cases wherein the congressional power to inquire into the executive branch – on the contrary – should be at its maximum extent[615]. By establishing an impeachment clause in the

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[612] *Executive Privilege*, ibid.

[613] Ibid.

[614] Id., at 3 ("Who has a more legitimate interest in inquiring whether a law has been faithfully executed than the lawmaker?")

[615] See H. R. Rept. No. 27-271, 27th Cong., 3rd Sess. (1843) pp. 4-6 (quoted in JOHN R. LABOVITZ, *Presidential Impeachment*, 211 (New Haven: Yale University Press 1978)) ("The House of Representatives has the sole power of impeachment. The President himself, in the discharge of his most independent functions, is subject to the exercise of this power-a power which implie[s] the right of inquiry on the part of the House to the fullest and most unlimited extent. If the House possesses the power to impeach, it must likewise possess all the incidents of that power-the power to compel the attendance of all witnesses and the production of all such papers as may be considered necessary to prove the charges on which the impeachment is founded. If it did not, the power of impeachment conferred upon it by the Constitution would be nugatory. It could not exercise it with effect." (Internal quotation marks omitted.). See also ASHER C. HINDS, *Hinds' Precedents of the House of Representatives of the United States*, 183 (Washington, D.C., Gov't Print. Off., 1907).

Constitution, the Framers intended to force the President to account for allegedly illegal conduct of a certain gravity to Congress. In the same 1843 report, the House of Representatives stresses that it has "an original right" to demand information and obtain it from the executive branch, a right that derives from "[the House's] character of grand inquest of the nation."[616] It has also been noted that the executive branch does not have a power equivalent to that of impeachment to winnow the conduct of Congress. In other words, whereas Congress is empowered to assess presidential action and its compatibility with the Constitution and with the legal system on a whole, the President does not enjoy correspondent authority towards the legislative branch. Urged by a letter of a Representative expressing President John Tyler's frustration over a congressional inquiry for purposes of impeachment, an inquiry that in particular involved a conflict over the production of certain documents by the President, the House of Representatives issued a report in 1860. This report underlines the very fact that while the President is always accountable to Congress, the opposite is not true, since the latter is not constitutionally required to be accountable to the Chief Executive[617]. As a result, according to the report, Congress's authority is broader than the one conferred upon the President. Even though he has some duties peculiar to his office, the President is not substantially different from any citizen: The power of impeachment serves the very purpose to avoid that the President be exempted from being subject to scrutiny and possible sanction[618]. The report, however, leans too much towards the legislative branch, whose position in the constitutional architecture is unduly emphasized. It argues, indeed, that the executive branch is always bound to be "inferior" to the legislative one, as only the latter "is omnipotent within the limits of the Constitution."[619] The fact that the President is assigned a veto power over Congress legislation does not make the former "coequal with that branch of government which helps to impose and define [the duties of the President, i.e., the legislative branch]."[620] It is interesting to note that in 1974 – the same year in which Berger monograph against executive privilege was released – the

[616] H. R. Rept. No. 271, id., at 13 (quoted in *Executive Privilege*, at 36-37).

[617] See H. R. Rept. No. 36-394, 36th Cong. 1st Sess., 2 (1860) ("The conduct of the President is always subject to the constitutional supervision and judgment of Congress; whilst he, on the contrary, has no such power over either branch of that body.")

[618] Id., at 2-3 ("The President and the citizen stand upon equality of rights. The distinction between them arises from an inequality of duties. Wherever the conduct of the latter is open to inquiry and charge, that of the former is not less so.")

[619] Id., at 3.

[620] Ibid.

Committee on the Judiciary of the House of Representatives issued a report[621] that, in recommending the impeachment of President Nixon, addressed the scope of investigations over the executive branch when Congress is exercising its power of impeachment. According to the report, even though the President may withhold information from Congress in other contexts, and, in particular, he has a legitimate interest in the confidentiality of his conversations with advisors, the Constitution devises the congressional power of inquiry related to impeachment proceedings to prevail over any need for secrecy the President may invoke[622].

Fourthly, the Commander-in-Chief Clause, contained in Article II, section 2, Clause 1, Const.[623], is deemed to constitute another argument against the existence of executive privilege. Berger suggests relating this clause with Article I, Section 8, Clause 11, which confers the power to declare war upon the legislative branch. Congress – he contends – turns out to be the supreme branch of the Federal Government even in wartime, for congressional authorization is necessary to begin a war. Berger notes that in the Federalist Papers, one of America's "sacred text[s],"[624] the President's war authority was meant as being restricted to that of a first general[625]. Berger also cites a scholarly opinion consistent with his – the one

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[621] See HOUSE JUDICIARY COMMITTEE, *Impeachment of Richard M. Nixon, President of the United States*, H. R. Rep. No. 93-1305, 93rd Cong., 2nd Sess. (1974).

[622] Id., at 209 ("Whatever the limits of the legislative power in other contexts – and whatever need may otherwise exist for preserving the confidentiality of Presidential conversation – in the context of an impeachment proceeding the balance was struck in favor of the power of inquiry when the impeachment provision was written into the Constitution.")

[623] This provision qualifies the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States […]."

[624] CLINTON ROSSITER, *Alexander Hamilton and the Constitution*, 52 (New York, 1964) (quoted in JAMES G. WILSON, *The Most Sacred Text: The Supreme Court's Use of The Federalist Papers*, Brigham Young Uni. L. Rev. 65, 127 (1985)). See also Clinton Rossiter (ed.), The Federalist, vii (New American Library, New York, 1961) ("The Federalist is the most important work in political science that has ever been written, or is likely ever to be written, in the United States.") But see also *McCullough v. Maryland*, 17 U.S. (4 Wheat) 316, 433 (1819) (Marshall, C.J.) (quoted in RAOUL BERGER, *Executive Privilege. A Reply to Professor Sofaer*, 75 Colum. L. Rev. 603, 607 note 33 (1975)) ("No tribute can be paid to [The Federalist Papers' authors] which exceeds their merit; but in applying their opinions to the cases […] a right to judge of their correctness must be retained […].")

[625] *Executive Privilege*, at 63 (quoting *The Federalist No. 69*, 448 (New York, 1937) (A. Hamilton)) (arguing that the U.S. President's authority as Commander-in-Chief may not be equated to that of the king in the British experience, as the former has a more restricted scope). The authority vested in the Chief Executive, indeed – Hamilton explains – "would amount to nothing more than the supreme

expressed by Henkin, who underscores the merely executive nature of the functions performed by generals[626]. According to Berger, the supremacy of Congress over the executive branch emerged as early as during the Revolutionary War[627]. The Continental Congress appointed George Washington as Commander in Chief of the Continental Army in 1775, and Rostow has highlighted Washington's "humble posture" in performing the functions he was assigned[628]. Such a posture was consistent with the intent of the Continental Congress, which demanded that Washington be "its creature, or the creature of its committees, in every respect."[629] Rostow, whose contribution to the matter Berger exploits in part to corroborate his theory[630], quotes a passage from an address delivered by Sen. Javits. The Senator has argued that the Framers were so influenced by the dynamics of the relationship between the Continental Congress and George Washington that such a relationship may be considered the "legislative history" of the concept of Commander-in-Chief as meant in Article II of the Constitution[631].

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command and direction of the military and naval forces, as first General and admiral […] while that of the British King extends to the declaring of war and to the rising and regulating of fleets and armies – all which, by the Constitution […] would appertain to the Legislature." Ibid.

[626] See LOUIS HENKIN, *Foreign Affairs and the Constitution,* 50-51 (The Foundation Press, New York, 1972) (quoted in *Executive Privilege*, ibid.) (contending that "generals and admirals, even when they are 'first,' do not determine the political purposes for which troops are to be used [, but rather] they command [such troops] in the execution of policy made by others.")

[627] See *Executive Privilege,* at 62.

[628] EUGENE V. ROSTOW, *Great Cases Make Bad Law: The War Powers Act*, 50 Texas L. Rev. 833, 840 (1972) (referring to SEN. JACOB K. JAVITS, *The Case for War Powers Legislation* – Address to the American Bar Association Standing Comm. on World Order under Law, Hearing on War Powers of the President and Congress (February 5, 1972), 4-5).

[629] ROSTOW, ibid. (quoted in *Executive Privilege*, at 62).

[630] See *Executive Privilege,* at 62; RAOUL BERGER, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 33 (1972).

[631] JAVITS, *The Case for War Powers Legislation,* (quoted in ROSTOW, *Great Cases Make Bad Law,* supra note 628, at 840 note 14) ("Clearly, the drafters of the Constitution had in mind the experience of the Continental Congress with George Washington when they designated the President as 'Commander-in-Chief' in Article II Section 2. Thus, the 'legislative history' of the Constitutional concept of a Commander-in-Chief was the relationship of George Washington as colonial Commander-in-Chief to the Continental Congress.") To enrich his assertion with historical evidence, Sen. Javits quotes the final clause of the commission designating Washington as Commander-in-Chief. George Washington was required not only to stick to what the commission stipulated, but also to punctually "observe and follow such orders and directions from time to time as [he would] receive" from the Continental Congress itself or a future (different) Congress. Ibid.

Fifthly, Berger makes a case against executive privilege by referring to the distribution of powers between the legislative and executive branches in the field of foreign affairs. Under Article 2, Section 2, Clause 2, Const., the authority to make treaties is vested in the President, but the Senate has to give its "Advice and Consent […]." From Berger's viewpoint, the Founding Fathers intended to make the Senate an active and full partner of the Chief Executive – and of diplomats acting on his behalf – in the formation of treaties[632]. In this regard, James Madison argued that treaties belong under sheer legislation, and, as such, they call for execution by the executive branch[633]. The Senate – Berger observes – is empowered to participate in all stages of negotiation, as the constitutional provision does not distinguish between negotiation and ratification of treaties. The original version of the constitutional provision conferred the whole treaty-making power upon the Senate, yet the Framers eventually opted for the splitting of the power between the President and the Senate[634]. From such evolution the provision went through in the drafting process of the Constitution – the Author continues – it may not be inferred that the Framers intended to exclude the Senate from any involvement in the formation of treaties, for "[n]ot the slightest hint is to be found in the Convention records" that this was the underlying intent."[635] He mentions Federalist No. 75, wherein Hamilton contended that the participation of at least a component of the legislative branch in the making of treaties should be ensured not only for "the vast importance of the trust [in negotiations with foreign countries]," but also in consideration of the purely legislative nature of treaties[636]. Therefore, "the joint possession" – Hamilton continued – of the treaty-making power by the President and the Senate "would afford a greater prospect of security, than the separate possession of it by either of them."[637]

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[632] See *Executive Privilege*, at 129 note 63 (quoting MYRES S. MCDOUGAL – ASHER LANS, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L. J. 534, 539 note 25 (1945)) ("The testimony of delegates to the Constitutional Convention clearly indicates the intention of the draftsmen that the Senate participate equally with the President in the step-by-step negotiation of treaties.")

[633] See *"Helvidius" Number 1*, reprinted in THOMAS MASON et al. (eds.), 15 *The Papers of James Madison* 66, 69 (1985) ("A treaty is not an execution of laws: it does not presuppose the existence of laws. It is, on the contrary, to have itself the force of a law, and to be carried into execution, like all other laws, by the executive magistrate.")

[634] See *Executive Privilege*, at 127 (noting that the President "was [only] finally made a participant in the treaty-making process, which had been initially lodged – after the pattern of the Continental Congress – in the Senate alone.").

[635] Ibid.

[636] Id., at 128 (quoting *Federalist No. 75* (Hamilton), in The Federalist, supra note 625, at 486).

[637] Ibid (quoting Federalist No. 75, id., at 488).

Berger deems the predominant role traditionally played by the U.S. President in the formation of treaties to be unlawful, as it results in depriving the Senate of its authority in the field. Such "monopolistic"[638] practices, whereby the President has marginalized the legislative branch both in the making of treaties and in the declaration and conduction of a war, have been justified by scholars by invoking a doctrine based on "adaptation by usage."[639] Under such a doctrine, expressed by McDougal and Lans, a practice that various U.S. administrations have resorted to over time gradually entrenches itself within the legal system, and this very fact "makes its contemporary constitutionality unquestionable."[640] According to Berger, which opposes the doctrine vehemently, "adaptation by usage" is just a label aimed at providing an appearance of legitimacy to "successive usurpations whereby the President has taken over treaty functions confided to Senate and President jointly, and war functions exclusively granted to Congress and withheld from him."[641] Such practices – Berger continues – bring about a significant alteration of the constitutional distribution of competence between the branches of the Federal Government, which instead would be "inviolable under the separation of powers."[642]

B. Prakash's Arguments Against Executive Privilege

Despite deploying different arguments from those set forth by Berger more than twenty years earlier, Prakash, too, opposes to the existence of executive privilege by highlighting the predominant role Congress has in the Federal Government. Prakash's theory may be summed up as follows: Everything in the Federal Government emanates from Congress, which thus ends up recalling what some ancient philosophical theories used to consider the Prime Mover of the universe – in this case, of the U.S. Government. Prakash argues that the effective ability for the President of the United States to wield the powers vested in him by the Constitution requires the cooperation of Congress, which by passing budget legislation, made of a long series of appropriations, provides the President and the executive branch as a whole with the necessary funding for them to carry out their

[638] *Executive Privilege*, at 117.
[639] Id., at 89.
[640] MCDOUGAL – LANS, *Treaties and Congressional-Executive or Presidential Agreements*, supra note 632, at 291.
[641] *Executive Privilege*, at 89.
[642] Ibid.

institutional functions[643]. To put it differently, since the power of the purse is vested in Congress, the President depends on appropriation provisions established by Congress to be able to operate. As the Author notes, "without a steady and sufficient supply of funds, the President cannot possibly satisfy his constitutional duties or fulfill the promise of his executive powers."[644] The Chief Executive, indeed, is not permitted to use financial resources without legislative authorization[645]. The President's role as Commander-in-Chief, assigned to him by Article II Const., also depends on appropriation provisions established by Congress, which other than creating the armed forces and the militia initially, enable the President to provide them every year with a salary and proper equipment[646]. If Congress were to decide to stop appropriating funds for the keeping of an army, the constitutional function of Commander-in-Chief would boil down to "a nullity."[647] Furthermore, Prakash observes that since the Constitution entrusts Congress with the power – not the duty – to establish an army and call out the militia, it may occur that the President turns out to be "a Commander of absolutely no one from time to time."[648]

Similarly, Prakash reads the Necessary and Proper Clause provided for in Article I, Section 8, Clause 18[649], as proof of the assertion that only Congress's intervention allows the executive branch to execute its functions. Such a clause, indeed, is deemed to include the authority to establish and equip executive departments and agencies. Therefore, it is incumbent upon Congress to create all structures and bodies constituting overall the executive branch of the Federal Government – what may be called the administrative state. The President, instead, is prohibited from creating entities and offices on his own account[650]. Such an interpretation of the Necessary and Proper Clause – Prakash argues – finds

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[643] See PRAKASH, *A critical Comment on the Constitutionality of Executive Privilege*, supra note 589, at 1154 (noting that the formal text of the Constitution only requires that the President be ensured a salary for his office).

[644] Ibid.

[645] Id., at 1156.

[646] Id., at 1157.

[647] Ibid.

[648] Id., at 1159.

[649] Such a constitutional clause empowers Congress to adopt "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[650] See PRAKASH, *A critical Comment on the Constitutionality of Executive Privilege*, supra note 589, at 1160-1162.

confirmation in history. It is Congress, indeed, that by adopting statutory provisions has gradually formed the structure of the executive branch[651].

By characterizing Congress as a sort of driving force of the whole Federal Government and thus as the ultimate source of all powers vested by the Constitution in the three sovereign branches, Prakash takes up the position expressed by Van Alstyne[652]. They both agree, indeed, that the Constitution grants Congress the authority to provide the President with financial and organizational means to perform his functions. According to Prakash, since "powerful textual, structural, or historical arguments [showing] the contrary" do not appear to exist, it must be held that "Congress not only controls the more central means, but the peripheral means of execution [of presidential powers] as well."[653] Van Alstyne and Prakash outline a constitutional architecture wherein the other two branches of government – namely, the executive branch – depend entirely on Congress to be able to wield their powers and fulfill their duties. Congress is empowered not only to enact all statutes that are deemed to be necessary and proper to allow the whole Federal Government to work, but also to confer upon the other branches "incidental authorities" in order for them to begin "carrying into execution their respective powers."[654] Such an interpretation of the allocation of powers within the Federal Government leaves no room for claims of executive privilege. Prakash, indeed, concludes that since Congress turns out to be the supreme branch of government, it may not be refused access to the information it needs[655]. Not so dissimilar – in the end – is the conclusion reached by Van Alstyne, who does not exclude radically the invocation of executive privilege, but subjects the usage of the privilege to legislative authorization[656].

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[651] Id., at 1161 (noting that "for over two centuries, Congress created the offices and departments, deciding whether, when, and how it would furnish the means of assisting the President in the use of his constitutional powers and in the fulfillment of his constitutional duties.")

[652] See, in particular, WILLIAM W. VAN ALSTYNE, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effects of the Sweeping Clause*, Law & Contemp. Probs. 102 (1976).

[653] PRAKASH, *A critical Comment on the Constitutionality of Executive Privilege*, supra note 589, at 1163.

[654] Id., at 1164-1165 (referring to VAN ALSTYNE, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts*, supra note 652, at 128).

[655] Id., at 1163 ("Given these admittedly uncomfortable constitutional realities [, from which it emerges the need for the Executive to depend on Congress to perform its functions], how can we believe that the President has either an inherent or a penumbral right to secret communications?")

[656] Id., at 1165 (quoting VAN ALSTYNE, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts*, supra note 652, at 128) (recalling that according to Van

C. Advocating the Existence of Executive Privilege

1. Rebutting Berger's Arguments Against Executive Privilege

First of all, Berger relies on a myriad of precedents concerning investigations conducted by the British Parliament over the government to claim that the U.S. Congress, modeled upon its British counterpart, enjoys an unlimited power to inquire into the executive branch. The accuracy and breadth of the analysis is doubtless commendable, and it certainly took Berger a considerable effort to trace the congressional power of inquiry back to the British experience[657]. Furthermore, making reference to historical precedents to sustain a given interpretation of one or more provisions in the U.S. Constitution is a somewhat widespread technique, which not only scholars but anyone working in the law tend to deploy[658]. Reid has maintained that "forensic history," which consists in the merging of law and history, "for centuries has made legitimate contributions […,] especially to Anglo-American constitutional law."[659] Criticism has been directed at Berger, however, on the merits of his research, that is, on its content. Sofaer, in particular, has argued that Berger engaged in a deep but biased winnowing of historical evidence, because he then employed just the material useful to support his theory[660]. The Author has stamped Berger's

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Alstyne, when the invocation of executive privilege is simply based on the assumption that the privilege itself appears to be "reasonably appropriate" in consideration of the overall authority vested in the U.S. President by the Constitution, such an invocation is legitimate only if it is expressly authorized by an act of Congress).

[657] See R.H. CLARK, *Executive Privilege: A Review of Berger*, 8 Akron L. Rev. 324, 324 (1975) (giving high credit to Berger for the meticulousness of his study). Clark, in particular, characterizes Berger's work as a "momentum to scholarly research and analysis […]." Ibid.

[658] See MARTIN S. FLAHERTY, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 524 (1995) (observing that "[l]awyers, judges, and […] legal academics regularly turn to history when talking about the Constitution, and not merely as a rhetorical trope.") It does not mean, however, that historical references to explain a constitutional provision are always proper and correct. The Author argues, indeed, that "constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers." Id., at 525.

[659] JOHN PHILLIP REID, *Law and History*, 27 Loy. L.A. L. Rev. 193, 205 (1993).

[660] See ABRAHAM D. SOFAER, (Book Review) *Executive Privilege: A Constitutional Myth*, 88 Harv. L. Rev. 281, 284 (1974) (esteeming the pre-1789 history reported by Berger as "incomplete and biased.") Berger – the Author explains – "selects isolated events and statements out of contexts that are complicated and ambiguous, and bludgeons his way to the conclusions he so earnestly wants to reach." His assertion that in the British experience, the Parliament enjoyed an absolute power to inquire into the government and the administration, for instance, is corroborated only with seventeenth-century precedents, whereas parliamentary investigations carried out during the eighteenth century are almost entirely overlooked. Ibid. Furthermore, Sofaer notes that when Bailyn

reconstruction of the historical roots of the power of congressional inquiry into the Executive as "wholly one-sided, and therefore misleading […]."[661] Secondly, Berger has also inferred the incompatibility of executive privilege with the Constitution from the State of the Union Clause, pursuant to Article II, Section 3, Clause 1, Const. He reads the clause as though it imposed on the President a duty to supply information and bestowed upon Congress a corresponding right to claim the fulfillment of such a duty. Therefore, according to Berger, the Chief Executive does not have any discretion to select the material to disclose, which instead should consist of what serves to consider the Congress's demand for periodic information on the state of the American Republic satisfied. Berger's slant on the clause essentially rests on the provision originally proposed at the Convention of Philadelphia, which saddled the President with a duty to inform the legislative branch on the condition of the American Republic. Berger endeavors to prove that such a duty remains in the final version of the clause and is even specified, though in reality in the provision approved by the Convention and inserted in the text of the Constitution, not only is any express reference to an actual duty to inform disappeared, but the verb "shall" and – above all – the phrase "from time to time" suggest that the President is assigned some margins of discretion in informing Congress on the progress of the Federal Government. It has been argued that the idea of presidential submission to Congress in providing periodic updates on the state of the United States had been scratched by the time the final version of the constitutional provision was approved[662]. To sustain the theory that recognizes to the President some discretion in

– Berger's main source – pinpointed seventeenth-century Britain as the context the Framers drew upon the most, his intent was not to extol the British Parliament's power of oversight over the government. Ibid. (referring to BERNARD BAILYN, *The Ideological Origins of the American Revolution*, 26-54 (Harvard University Press, MA, 1967)). See also RALPH K. WINTER, JR., *The Seedlings For the Forest*, 83 Yale L. J. 1730, 1733 (1974) (censuring Berger's partial collection of historical material and contending that "only a laboriously tortured reading of the past supports the conclusion that executive privilege is a 'constitutional myth.'"); ALBERT A. LEE, (Book Review) *Executive Privilege: A Constitutional Myth*, 74 Columb. L. Rev. 1360, 1360-1361 (1974) (stressing that "Berger's historical interpretations are […] wedded to his policy preferences, and the offspring of this union is an advocate's version of history.")

[661] SOFAER, ibid.

[662] See GARY J. SCHMITT, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in JOSEPH BESSETTE – JEFFREY K. TULIS, *The Presidency in the Constitutional Order: An Historical Examination*, 159 (New Brunswick: New Jersey, 2010) (considering at least dubious the claim that "the first proposal [of the State of the Union Clause] manifests the true spirit of this segment of the Constitution […].") Common sense – the Authors continue – suggests that the

providing Congress with information on the state of the country, Schmitt mentions a House of Representatives resolution prepared by Rep. Van Dyke[663]. Since Berger referred to congressional documents dating back to the nineteenth century to sustain his position, the reference to such documents must be acknowledged also a technique to rebut Berger's doctrine. This House resolution, related to a request for information on the military sphere made to the executive branch, underlines that the President has a discretionary power to pinpoint the substantial content – and thus the extent – of the information sharing with Congress[664].

Thirdly, Berger looks to the Take Care Clause to foreclose any room for executive privilege. In his opinion, Congress is the lawmaker and, as such, is always entitled to demand information in order to oversee the execution of the laws, i.e., of the product of the lawmaking activity, by the executive branch. This consideration tends to lead to a distinction between a formal and a substantial meaning of executive power. A distinguished scholar of such a subject matter – Mansfield – has observed that "the real, practical, informal executive […] is far more powerful than the supposed, theoretical formal executive."[665] Merry, however, has pointed out that the interpretation of the President's authority as merely executive was quite widespread at the Convention of Philadelphia[666], and such a position holds true in part, since the execution of the laws is an integral part of the executive power, more precisely the core of such a power[667]. However, arguing that the President is only

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President has such amount of discretion as he needs to establish on his own account the content and timing of the information to furnish to Congress. Ibid.

[663] Id., at 160.

[664] 2 The Debates and Proceedings in the Congress of the United States (Annals of Cong.), 10th Cong., 1st Sess., House of Representatives (February 1808) 1644 (maintaining that the President enjoys discretion in judging "what is proper for communication," even though the House of Representatives is allowed – obviously – to request information anytime).

[665] HARVEY C. MANSFIELD, *Taming the Prince: The Ambivalence of Modern Executive Power*, 4 (New York, 1989).

[666] See MATTHEW A. PAULEY, *I Do Solemnly Swear: The President's Constitutional Oath*, 177 (Lanham: Maryland, 1999) (referring to HENRY J. MERRY, *The Constitutional System: The Group Character of the Elected Institutions*, 37 (New York, 1986)). At the 1787 Constitutional Convention, Roger Sherman of Connecticut, for example, defined "the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect." FARRAND, 1 *The Records of the Convention*, at 65.

[667] James Wilson warned at the Convention about a concentration of both executive and legislative prerogatives in the hands of the Head of the executive branch, whom he thought would be better embodied by "a single magistrate […]." Ibid. The only powers Wilson deemed to be "strictly Executive were those of executing the laws, and appointing officers," except for officers that

responsible for the execution of the laws requires, firstly, giving the concept of "execution of the laws" a broad interpretation. To justify the assertion that the President should always have a power to remove his appointees, whatever the nature of the duties and tasks they are charged with carrying out, for instance, in a 1926 decision – *Myers v. United States*[668] – the Supreme Court observed that not only is the President required to execute the laws of Congress, but he has also to ensure that the execution occur in a "unitary and uniform" fashion[669]. Article II of the Constitution – the Supreme Court continued – "evidently contemplated [such a further prescription] in vesting general executive power in the President alone."[670] Furthermore, and above all, it has been noted that the acceptation that considered the President as "a pure servant of the legislators" had lost all its appeal by the early decades of the twentieth century[671]. Mansfield has argued that the role of the President in the U.S. constitutional framework cannot be drawn from the "dictionary definition" of executive power, and therefore it does not boil down to merely "carry[ing] out the intention of the law."[672] A strong executive branch, on the contrary, is necessary – the Author observes – because it is the only remedy against "legislative usurpation [of the President's remit]."[673] The Constitution, indeed, assigns the President a set of powers and duties that constitute his comprehensive, independent competence, as the separation of powers calls for[674]. Ensuring the faithful execution of the statutes passed by Congress, therefore, is only one of the presidential duties, "for the performance of which he is given several powers."[675] The President's remit encompasses a series of powers, and some of them are not expressly

belonged to the legislative branch and – accordingly – were appointed by Congress. Id., at 66. See, also, 1 Annals of Cong., 519 (Gales & Seaton eds., 1789) (statement of James Madison) ("[I]f anything is in its nature executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed.")

[668] 272 U.S. 52 (1926).

[669] Id., at 135.

[670] Ibid.

[671] PAULEY, *I Do Solemnly Swear*, supra note 666, at 177-178 (referring to MERRY, *The Constitutional System*, at 78).

[672] MANSFIELD, *Taming the Prince*, supra note 665, at 2.

[673] Id., at 16. Mansfield spurs U.S. presidents and scholars to champion a strong executive power. He maintains, indeed, that the President "needs a doctrine, a 'literary theory,' to protect himself against the partisan application by the legislature of the dictionary definition of executive, which would reduce him to [a Congress's] instrument." Ibid.

[674] See RUTH W. GRANT – STEPHEN GRANT, *The Madisonian Presidency*, in BESSETTE – TULIS, *The Presidency in the Constitutional Order*, supra note 662, at 43.

[675] MANSFIELD, *Taming the Prince*, supra note 665, at 4.

mentioned in Article II of the Constitution. Among the implied powers is executive privilege, meant – as noted above – as the prerogative of the President to withhold information from Congress.

Fourthly, Berger maintains that executive privilege contrasts with the Impeachment Clause. On the one hand, impeachment represents a formidable tool Congress may deploy to gain information from the executive branch. Fisher has argued – and shown by providing precedents as examples thereof – that the congressional leverage that is usually capable of forcing the President to release documents encompasses three different weapons: the threat of conducting investigations for purposes of impeachment; the threat of exercising the contempt power, i.e., the power to hold executive branch officials – and members of the Cabinet – in contempt; and the block of presidential nominations provoked by the refuse of the Senate to give its consent in the appointing process[676]. On the other hand, Article II, Section 4 Const. relates impeachment to the commission of "treason, bribery, or other high Crimes and Misdemeanors." It means that the impeachment power is supposed to be exercised not on a regular basis but, as Hamilton argued, as a response to "those offences which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust [, and thus end up having a political nature] as they relate chiefly to injuries done immediately to the society itself."[677] Therefore, an argument aimed at challenging the existence of executive privilege based on the Impeachment Clause proves somewhat weak due to the limited application of the Clause. Furthermore, the meaning of the phrase "high Crimes and Misdemeanors," whose specific content the Constitution fails to provide, calls for reference to "the English practice of parliamentary impeachments."[678] As Schmitt has noted, however, Berger himself concedes that the impeachment power vested in the British Parliament is broader than the one the U.S. Congress enjoys[679]. Consequently, inferring an absolute congressional power of inquiry into the executive branch from the

[676] See LOUIS FISHER, *Invoking Executive Privilege. Navigating Ticklish Political Waters*, 8 Wm. & Mary Bill Rts. J. 583, 595-602 (2000).

[677] *The Federalist No. 65*, supra note 625, at 423-424 (A. Hamilton).

[678] JARED P. COLE – TODD GARVEY, *Impeachment and Removal*, CRS Report for Congress (October 29, 2015). In the British experience, impeachment procedures "appea[r] to have been directed against individuals accused of crimes against the state and encompassed offenses beyond traditional criminal law." Ibid.

[679] SCHMITT, *Executive Privilege*, supra note 662, at 158 (quoting RAOUL BERGER, Impeachment: The Constitutional Problems, 311 (Harvard University Press, 1973)) ("[The British] Parliament, it is true, asserted virtually unlimited power; but the Framers had no intention of conferring such power upon Congress.")

scope of impeachment investigations conducted by the British Parliament appears to be dubious at least[680].

Fifthly, Berger also appeals to the Commander-in-Chief Clause to object to the legitimacy of executive privilege. As the case with the impeachment power, war and regulation of the military are other aspects wherein the British and the U.S. experience differ. A 1850 Supreme Court decision identified war powers as an example of the difference between the Executive in the two countries[681]. Unlike the British tradition, in the United States the powers to declare war and to lay down rules on the Army are vested not in the Chief Executive but in Congress[682]. Congress, however, showed all along a tendency to fail to exercise those powers, and the President has frequently taken over the whole authority in the war sector[683]. Sofaer has maintained that "Berger cannot seriously expect [the distribution of was powers arisen in practice between the legislative and executive branch] to be refashioned on the basis of his reading of pre-1789 history."[684] The President is in charge of military operations[685] and thus when the United States wages war, the President enjoys a power of direction[686] that actually makes him more than just a general in a position of *primus inter pares*. Not only does the President play an overwhelming role in the

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[680] SCHMITT, *Executive Privilege*, at 157.

[681] See *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850) ("[I]n the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belongs to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquests in war, or any other subject where the rights and powers of the executive arm of the government are brought into question.")

[682] Article 1, Section 8, Const. See LOUIS FISHER, *Congressional Access to National Security Information*, 45 Harv. J. on Legisl. 219, 223 (2008) (pointing out that the Framers conferred the power to initiate war upon Congress "because they believed that Executives, in their search for fame and personal glory, had a natural bias to favor war at the cost of the interests of their country.")

[683] See SOFAER, (Book Review) *Executive Privilege*, supra note 660, at 286 (observing that "the overwhelming effect of the actions and inactions of our early Congresses was to allow the President to assume control of foreign affairs and the military.") The allocation of power which ensued – the Author continues – "has persisted to the present […]." Ibid.

[684] Ibid.

[685] See SCHMITT, *Executive Privilege*, supra note 662, at 170 (according to whom, "[t]he fact that a President may not have the power to begin a war does not clarify the amount of discretion that a President has in conducting a war.")

[686] See *The Federalist No. 74*, 385 (The Goldman ed., 2001) (Hamilton) (contending that the "direction of war," which in his opinion requires a single head of the executive branch, "implies the direction of the common strength [, and] the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.")

conduction of war, but he also has a good deal of discretion in governing military operations[687]. Therefore, "Berger's thesis of a restricted and congressionally subordinate" Commander-in-chief[688] must be considered not tenable, and it also means recognizing the President – as Commander-in-Chief – some leeway in answering to requests for information advanced by Congress[689]. As noted above, Berger advocates Congress's right to have complete access to war-related information by recalling the relationship between the Congressional Congress and George Washington as Commander-in-Chief[690]. Not only has such an example been questioned[691]. It also appears to be too weak evidence to support a theory on information access disputes between the two political branches of the Federal Government in a war context.

2. The Treaty-Making Power and Secrecy

Berger's argument against executive privilege based on the distribution of power established by the Constitution in the field of foreign affairs deserves specific analysis, because this argument refers to a domain, of which secrecy is a typical feature, especially when the formation of treaties is involved. As noted above, indeed, this field has traditionally been considered as falling within the scope of government secrecy. Even though the treaty-making power is vested in the President, Article 2, Section 2, Clause 2, Const. requires that the Senate give its "Advice and Consent," and therefore the legislative branch should be

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[687] See MICHAEL STOKES PAULSEN, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga. L. Rev. 807 (2006) (arguing that under the Commander-in-Chief Clause, in the event of a war, it is up to the President to make all decisions concerning military objectives, strategy, and tactics, rules of engagement, treatment of prisoners of war).

[688] SCHMITT, *Executive Privilege*, supra note 662, at 172.

[689] See WILLIAM VAN ALSTYNE, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. Rev. 116, 118 (1974) (arguing that the President is to be guaranteed "a privilege of confidentiality respecting specific troop locations during a time of military emergency as an indispensable incident of his express power as Commander in Chief […].")

[690] See BERGER, *Rosenblum and the Higher Criticism*, supra note 592, at 925 note 31 (advocating complete access to executive branch information by Congress, which is "the senior partner in war-making […].") The Constitution, indeed, does not empower the President acting as Commander-in-Chief – the Author continues – "to withhold from Congress information as to troop deployments, particularly since George Washington was kept on a tight rein by the Continental Congress.") Ibid.

[691] See FISHER, *Raoul Berger on Public Law*, supra note 584, at 178 (questioning the example concerning George Washington as Commander-in-Chief, since it belongs to a time "when a separate executive did not exist," so it is not correct to "relate it to the separate and independent office [of the executive power] created in 1787.")

involved in foreign affairs. In its famous decision *United States v. Curtiss-Wright Export Corp.*[692], the Supreme Court emphasized the pivotal role played by the Chief Executive in foreign affairs and the keeping of secrets he needs to rely upon to operate in this field. By quoting a statement of John Marshall made in 1800 in the House of Representatives[693], Justice Sutherland, which delivers the opinion of the Court, characterizes the U.S. President as "the *sole organ* of the nation in its external relations, and its sole representative with foreign nations."[694] In addition, Sutherland quotes a passage taken from a 1816 report prepared by the Senate Committee on Foreign Relations. This Senate report underscores that the Constitution pinpoints the President as the "representative of the United States with regard to foreign nations," and entrusts him with responsibility for managing international relations[695]. Such authority – the report continues – implies that the President has discretion in conducting negotiations with foreign countries, in which the involvement of the Senate results in diminishing the President's responsibility and thereby "impair[ing] the best security for the national safety." The success of these negotiations – the report adds – "frequently depends on secrecy and dispatch." [696]

The Curtiss-Wright opinion observes that since the President is the sole organ of the Federal Government in the domain of foreign affairs, he does not need to receive specific standing from Congress to operate. On the contrary, Congress is supposed to ensure that the President itself enjoy "a degree of discretion and freedom from statutory restriction […]."[697] In this field, the President relies upon his agents abroad – namely, diplomatic and consular officials – which represent an essential source of information for him. Secrecy concerning the information they gather on behalf of the President – the Curtiss-Wright opinion contends – "may be highly necessary, and the premature disclosure of it [would bring about] harmful results."[698] To sustain such an assertion, the *Curtiss-Wright* opinion mentions the famous episode in which President George Washington refused to provide the House of Representatives with instructions, correspondence, and documents on the negotiation of the Jay Treaty. The wisdom of the refusal to releasing the requested information – the opinion

[692] 299 U.S. 304 (1936).
[693] See Annals of Cong., 6th Cong., 613 (1800).
[694] *Curtiss-Wright*, 299 U.S., at 319 (italics added).
[695] See 8 U.S. Senate Reports, Committee on Foreign Relations, (February 15, 1816) p. 24.
[696] Ibid.
[697] *Curtiss-Wright*, 299 U.S., at 320.
[698] Ibid.

notes – "was recognized by the House itself and has never since been doubted."[699] *Curtiss-Wright* also cites the words Washington used to justify the withholding of information[700]. Consistently with his theory, Berger gives a different interpretation of the "sole organ" concept, and engages in a blast against the *Curtiss-Wright* opinion[701]. Schmitt observes that actually, Marshall stood somewhere in the middle between the two positions, even though he conceded a prevailing role of the Chief Executive in foreign affairs[702].

The Executive turns out to be the most important branch of the Federal Government in the field of foreign affairs. Since diplomatic agents and related officials possess the expertise necessary for the conduct of negotiations and the management of international relations in general, the competence in foreign affairs is traditionally considered to belong to the executive branch. A vast majority of scholars agree that the President is the only organ of the Republic competent to keep official connections with foreign countries, as he masters, by his officials, the main channels of communication at international level[703]. Accordingly,

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[699] Ibid.

[700] Id., at 320-321. Washington argued that "a full disclosure" of all documents concerning a negotiation with foreign authorities, even when the negotiation process had a positive outcome and thus led to the conclusion of a treaty, "might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers." U.S. Joint Committee on Printing, *1 A Compilation of the Messages and Papers of the Presidents – George Washington: Message to the House regarding Documents Relative to the Jay Treaty (March 30, 1796)* (New York, 1897) p. 194. Admitting that the House have a right to request and receive all the documents relating to a given international negotiation – Washington concluded – would result in "establish[ing] a dangerous precedent." Ibid.

[701] *Executive Privilege*, at 133-135.

[702] See SCHMITT, *Executive Privilege*, supra note 662, at 164-165 (contending that "[b]etween the extreme positions of Berger's president-as-clerk and Sutherland's president-as-sovereign Marshall charts an executive office which, while not simply beyond congressional influence or control, is to an extensive degree dominant in the area of foreign affairs.")

[703] See, e.g., PHILLIP R. TIMBLE, *The President's Foreign Affairs Power*, 83 Am. J. Int'l L. 750, 755 (1989) (highlighting the existence of undisputed consensus over the assertion that "the President has the exclusive power of official communication with foreign governments.") See also EDWARD S. CORWIN, *The President: Office and Powers*, 1787-1984, 214 (Randall W. Bland et al. eds., 5th rev. ed., New York University Press, 1984) (characterizing as a principle rooted in constitutional practice "the exclusive right of the President to be the nation's intermediary in its dealings with other nations.") See also LOUIS HENKIN, *Foreign Affairs and the United States Constitution*, 32 (2nd ed., 1996) (pointing out that "[f]rom the beginning, the President has been the organ of communication with foreign governments and has had control of the principal channels of information – making the President the voice as well the eyes and ears of the United States.")

there is no doubt that opening negotiations is up to the President[704]. By opposing such a theory, labelled as "the diplomacy power orthodoxy,"[705] a scholar – Scoville – has recently sought to demonstrate that actually, the legislative branch has its own channels and follow its own practices for international relations. All these channels and practices, according to the Author, make up "an understudied domain of legislative diplomacy."[706] Apart from this somewhat novel approach, the President is still considered as the institution of the Federal Government enjoying predominant authority in foreign affairs, yet at the same time Sutherland's opinion has gone through much criticism. On the one hand, the Curtiss-Wright decision is frequently quoted – or at least referred to – in federal courts' decisions[707] and executive branch papers[708] to pinpoint the scope of presidential power in foreign affairs. On the other hand, many scholars have questioned Sutherland's opinion on various counts[709], and a D.C. Circuit decision, too, underlined the excessive range of the "sole organ" doctrine, if it is meant as capable of advocating a substantially absolute power of the President over any matter that does not exhaust its effects domestically[710]. Furthermore, Fisher has noted that actually, the Supreme Court "has never denied to Congress its constitutional authority to enter the field of foreign affairs and limit, reverse, or modify presidential decisions."[711]

The treaty-making power, vested in the President, implies the keeping of secrets by the executive branch. Woodrow Wilson, for instance, a great advocate of the President as a figure enjoying supreme authority in foreign affairs, has inferred from such authority the corollary that the Senate – hence, the legislative branch – may not claim a right to be

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[704] See LEE B. ACKERMAN, *Executive Agreements, the Treaty-Making Clause, and Strict Constructionism*, 8 Loy. L.A. L. Rev. 587, 609 (1975) (arguing that "[i]t is certainly the President who starts the negotiations, and with whom other nations communicate.")

[705] RYAN M. SCOVILLE, *Legislative Diplomacy*, 112 Mich. L. Rev. 331, 333 (2013). The Author challenges "the accepted understanding [according to which] the Founders viewed an exclusively executive diplomacy power as necessary for the United States to respond quickly to international events, preserve secrecy, speak with a single voice, and negotiate from a position of strength." Ibid.

[706] Ibid.

[707] See LOUIS FISHER, *The "Sole Organ" Doctrine*, 23-27 (Law Library of Congress, August 2006).

[708] Id., at 1-2; ID., *The Law of the Executive Branch: Presidential Power*, 266 (Oxford University Press, Oxford and New York, 2014).

[709] See FISHER, *The "Sole Organ" Doctrine*, supra note 707, at 20-23.

[710] See *American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 note 6 (D.C. Cir. 1981) ("To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.")

[711] FISHER, *The Law of the Executive Branch*, supra note 708, at 268.

informed on a given negotiation until that negotiation is concluded[712]. By providing the advice and consent of the Senate, however, the Framers intended this chamber of Congress to have not a marginal role but rather an important one in the formation of treaties. Bradley and Flaherty have observed that had the Framers deemed to include in Article 2, Section 2, Clause 2, Const. only the power of the Senate to veto the conclusion and ratification of a treaty[713], the term "consent" would have sufficed to reach the constitutional objective[714]. Corwin has maintained that under the Constitution, "the President and the Senate are associated throughout the entire process of 'making' treaties."[715] It has been noted that George Washington initially sought to involve the Senate in the conduct of negotiations, but soon opted for an opposite practice[716]. From then onwards, the Senate was excluded from participation in negotiations on a regular basis, and usually received just a ready-made product for either approval or rejection, i.e., for the exercise of its consent power[717]. As

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[712] See WOODROW WILSON, *Constitutional Government in the United States*, 77-78 (New York: Columbia University Press, 1908) ("The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.")

[713] See CORWIN, *The Constitution and What It Means Today*, supra note 502, at 106 (noting that the treaty-making process is usually divided into two separate parts – negotiation and ratification – assigned in their entirety to different institutions of the Federal Government: the former assigned exclusively to the President, and the latter to the Senate). However, the text of the Constitution – the Author argues – "makes no such division of the subject […]." Ibid.

[714] See CURTIS A. BRADLEY – MARTIN S. FLAHERTY, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 627 (2004).

[715] CORWIN, *The Constitution and What It Means Today*, supra note 502, at 106. See, also, ID., *The President: Office and Powers, 1787-1957. History and Analysis of Practice and Opinion*, 207 (New York, 4th rev. ed., 1957).

[716] CORWIN, *The Constitution and What It Means Today*, ibid. (pointing out that originally, President Washington "tried to take counsel with the Senate even regarding the negotiation of treaties, but he early abandoned this method of procedure as unsatisfactory.") See, also, BRADLEY – FLAHERTY, *Executive Power Essentialism and Foreign Affairs*, supra note 714, at 631-634.

[717] See ACKERMAN, *Executive Agreements*, supra note 704, at 625 (quoting MCDOUGAL – LANS, *Treaties and Congressional-Executive or Presidential Agreements*, supra note 632, at 207 note 56) (arguing that during the Washington administration, "the Senate's role was reduced from vicarious participation in the making of treaties to that of 'exercising a right of giving or withholding consent to agreements, in whose making it had played no direct part.'") See, also, BRADLEY – FLAHERTY, *Executive Power Essentialism and Foreign Affairs*, id., at 626 (noting that the practice Washington

Bradley and Flaherty have maintained, such a distribution of roles between the President and the Senate, which began during the Washington administration, gradually became rooted in the treaty-making process, "and remains the practice today."[718]

Hayden has read such an evolution as a simple consequence of the flexible nature of Article 2, Section 2, Clause 2, Const., whose content depends on how the dynamics of the relations between the executive and the legislative branch structure their respective role[719]. In other words, practice is the key to understanding such relations in foreign affairs, and – actually – the same holds true for any other field wherein the competence of the two branches may overlap. At the Convention of Philadelphia, the Founding Fathers conceived of the participation of the Senate in the treaty-making process as a way of making that process more democratic[720]. It has been observed, indeed, that "the Senate's real power in the treaty-making process lies in its ability to set forth an adequate forum for public debate."[721] Pragmatic reasons, however, militate against the Senate's involvement. It has been noted, for instance, that the democratic method that the participation of the Senate in negotiations implies may result in hampering the achievement of the primary objective of a negotiation – the conclusion of an international treaty[722]. Therefore, an argument in favor of an exclusive – or almost exclusive – role of the President in conducting international negotiations is based on the need for efficiency, which is deemed to be better satisfied by the executive than by the legislative branch when it comes to negotiating at international level[723]. If the need for

started off while being President consisted in "often formulating and negotiating treaties without Senate input and simply presenting the treaties to the Senate for an affirmative or negative vote.")

[718] BRADLEY – FLAHERTY, ibid.

[719] RALSTON HAYDEN, *The Senate and Treaties: 1787-1817. The Development of the Treaty Making Functions of the United States Senate During Their Formative Period*, ix (London, 1920) (contending that "[t]he treaty clause of the Constitution is so flexible that the exact relations of the Senate and the executive in treaty-making could be worked out only in actual practice.")

[720] See ACKERMAN, *Executive Agreements*, supra note 704, at 598 (pointing out that "[t]he incorporation of the Senate in the making of treaties was established because it was the firm hope of the Framers to bring to bear upon the decision-making process a wider range of knowledge, inculcating any decision with the force of public backing.")

[721] Ibid.

[722] Id., at 599 (noting that an argument aimed at excluding the Senate from any involvement in negotiations "usually stems from the Senate's ability to block the consummation of a treaty.")

[723] See WALLACE MCCLURE, *International Executive Agreements: Democratic Procedure Under the Constitution of the United States*, 257 (New York: Columbia University Press, 1941) (arguing that "[t]he executive, set up for action, is usually a better agency for negotiation than is a body set up primarily for deliberation [, and] it is through negotiation, not primarily deliberation, that international affairs are conducted.")

efficiency leads to advocating a cardinal role of the President and his officials in conducting international negotiations, the same need may be invoked to justify secrecy in the course of a given negotiation. Practice, however, appears to be the key to grasping the relations between the legislative and the executive branch of the Federal Government not only in the negotiation of international treaties, but in the foreign affairs as a whole. An episode occurred under the Washington administration and reported by Fisher[724] may be given as an example concerning secrecy in this field. No negotiation of a treaty was involved in such an episode. In 1794, the Senate adopted a resolution whereby President Washington was requested to submit certain correspondence documenting diplomatic relations between the United States and France. At a Cabinet meeting addressing the request for information, Secretary of War Knox suggested refusing the release of any information demanded by the Senate, while Attorney General Randolph and William Bradford argued that the President had discretion to pinpoint what material he deemed improper to disclose. Washington submitted the requested correspondence, yet informed the Senate that he had decided to withhold such parts as "in [his] judgment, for public considerations, ought not to be communicated." The Senate did not insist – even though it could have done so – in demanding the release of the material it had been denied access to, thereby accepting the compromise between secrecy and transparency President Washington had found. As Sofaer has observed, "nothing would have prevented a majority [of members of Congress] from demanding the material, especially in confidence, or from using their power over foreign policy, funds and offices to pressure the President to divulge."[725]

D. Executive Privilege: Coinage of the Term and Subsequent Development

It has been noted that there is no trace of any presidential privilege, meant as one or more powers only implicitly vested in the President by the Constitution, in the debates at the Convention of Philadelphia of 1787[726]. Berger brings this approach based on legislative

[724] See FISHER, *The Politics of Executive Privilege*, supra note 161, at 13-14.

[725] ABRAHAM D. SOFAER, *Executive Privilege: An Historical Note*, 75 Colum. L. Rev. 1318, 1321 (1975).

[726] See ARCHIBALD COX, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1391 (1974) (noting that "[t]he very few directly pertinent statements by members of the Constitutional Convention assert the absence of any presidential privilege.") See, also, *Myers*, 272 U.S., supra note 668, at 205 ("In the proceedings of the Constitutional Convention ho hint can be found of any executive power except those definitely enumerated or inferable therefrom or from the duty to enforce the laws.")

history even further by referring to the state conventions and constitutions to grasp the essence of executive power and thereby strengthen its theory against the existence of executive privilege[727]. However, Fisher has argued that the provisions of the state constitutions may be sifted to pinpoint where at least part of the wording of the Federal Constitution of 1787 stems from, still they are of no use to determine the scope of the President's remit[728]. More generally, Berger's interpretation of the Constitution has been criticized for being too narrow[729], and thus for being fossilized on formalism, i.e., on the plain text of the constitutional provisions[730]. Some justices of the Supreme Court have followed a similar approach[731].

[727] See *Executive Privilege*, at 51-58. Berger refers to Goebel, Jr., who has argued that the word "executive" did not belong in the English common law system. However, this word entered the American law vocabulary "through its employment in various state constitutions adopted from 1776 onward [as a] revolutionary response to the situation precipitated by the repudiation of the royal prerogative." Id., at 51 (quoting JULIUS GOEBEL, JR., *Ex Parte Clio*, 54 Colum. L. Rev. 450, 474 (1954)). By relying upon such a consideration, Berger deems the reference to the provisions of the several state constitutions to be the first stage to delimit the scope of the executive power. *Executive Privilege*, ibid.

[728] See FISHER, *Raoul Berger on Public Law*, supra note 584, at 177 (maintaining that the text of state constitutions may be useful for the interpretation of the U.S. Constitution just "for the source of some constitutional language, but the original state charters tell us very little about the anticipated breadth of executive power at the national level.")

[729] See WINTER, JR., *The Seedlings For the Forest*, supra note 660, at 1731 (arguing that "the principal analytic mode Berger employs is so narrow as to be of very limited usefulness.")

[730] See RAOUL BERGER, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 297 (Harvard University Press, 1977) ("Like Chief Justice Burger and Justices Douglas and Frankfurther, I assert the right to look at the Constitution itself stripped of judicial incrustations, as the index of constitutional law and to affirm that the Supreme Court has no authority to substitute an 'unwritten Constitution' for the written Constitution the Founders gave us and the people ratified.") For a recent formal interpretation of the Constitution, see DAVID GRAY ADLER, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 Presidential Stud. Q. 376, especially at 381-383 (2012) (refusing to recognize to the executive branch any prerogatives exceeding the powers expressly vested in it by the Constitution).

[731] See the justices mentioned by Berger in the passage quoted in the previous note. See, also, *Myers*, 272 U.S., supra note 668, at 116 (Taft, C.J.) (subjecting to a narrow interpretation the separation of powers between the three branches of the Federal Government as devised by the Framers in the Constitution). According to the Chief Justice, in particular, "the branches should be kept separate in all in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.")

Berger has noted that the term "executive privilege," which is not expressly mentioned by the Constitution, was coined in 1958[732]. The roots of the doctrine of executive privilege, however, date back to 1954, a time in which Congress, boosted above all by Sen. McCarthy's anti-Communist campaign, appeared to be obsessed with an almost constant exercise of its power of inquiry[733]. As a result, as Clark has argued, President Eisenhower deployed the doctrine "in order to safeguard the innermost workings of the executive branch from this boundless congressional probing."[734] On May 17, 1954, while the Subcommittee of the Senate Committee on Government Operations was conducting an investigation, the President sent the Secretary of Defense a letter[735] wherein the existence of executive privilege was advocated[736]. The letter points out that even though the relations between the three branches of the Federal Government must be based on full cooperation, practice shows that the President denied to Congress access to executive branch information whenever he found that the requested material "was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation."[737] Candor in the exchange of advice and opinions between executive branch employees – the letter observes – ensures "efficient and effective administration," but such candor demands the ability to withhold information from Congress[738]. It is not in the public interest – the letter continues – to disclose any communications within the executive branch or any documents concerning the exchange of opinions[739]. Accordingly, the Secretary of Defense has to instruct all employees

[732] See *Executive Privilege*, at 1. See CLARK, *Executive Privilege*, supra note 667, ibid. (maintaining that "[o]ne of the most surprising aspects of executive privilege is how recently the doctrine has become significant.") Clark, however, specifies that the term "executive privilege" was used as early as 1955. Id., at 324 note 3 (referring to TALFORD TAYLOR, *Grand Inquest: The Story of Congressional Investigations*, 97 (New York, 1955)).

[733] Id., at 324-325.

[734] Id., at 325.

[735] See DWIGHT EISENHOWER, *Letter to the Secretary of Defense Directing Him To Withhold Certain Information from the Senate Committee on Government Operations (May 17, 1954)*, in Public Papers of the Presidents of the United States, *Dwight D. Eisenhower – 1954: Containing the Public Messages, Speeches, and Statements of the President, January 1, to December 31, 1954, ,* 483 (Washington, D.C., U.S. Gov't Print. Off., 1960).

[736] See SCHLESINGER JR., *The Imperial Presidency*, supra note 146, at 156 (arguing that the 1954 letter contained "the most absolute assertion of presidential right to withhold information from Congress ever uttered to that day in American History.")

[737] EISENHOWER, *Letter to the Secretary of Defense*, supra note 735, ibid.

[738] Ibid.

[739] Id., at 483-484.

of his Department neither to testify about any such communications nor to release any documents concerning the exchange of opinions, and the letter makes it clear that this prescription applies "regardless of who would be benefited by such disclosures."[740] The 1954 letter, therefore, adopts a broad acceptation of the concept of executive privilege, an acceptation that includes the core of the content of Exemption 5 of the FOIA – the deliberative process privilege[741].

Actually, the germ of the doctrine of executive privilege dates back to a few years before the Eisenhower letter, and lies in a study conducted in by Herman Wolkinson[742], who was then working as an attorney at the Department of Justice[743]. According to this study, federal courts have always conceded that the U.S. President and the heads of departments enjoy "an uncontrolled discretion" to withhold executive branch information and papers[744]. Commenting on that statement, however, Fisher has argued that Wolkinson's position was already incorrect when it was written, and "is even less true today as a result of litigation and political precedents established over the past half century."[745] Furthermore, Wolkinson has excluded the existence of any means by which Congress could compel the heads of departments and agencies to release information they decided to withhold, provided that department and agency determinations are sanctioned by the President. Even if a public interest in disclosure is involved, he explains, "the President is the [only] judge of that interest."[746] Fisher, however, again opposes the assertion by contending that Wolkinson overlooked the coercive powers of Congress, which "may hold both executive officials and private citizens in contempt."[747]

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[740] Id., at 484.

[741] See infra, Chapter 3, Part II.

[742] See HERMAN WOLKINSON, *Demands of Congressional Committees for Executive Papers (Part I)*, 10 Fed'l Bar J. 103 (1949).

[743] In that study, Wolkinson was just expounding his own opinion on the withholding of information by the Chief Executive, as he had received no official assignment by the Truman administration. See SCHLESINGER JR., *The Imperial Presidency*, supra note 146, at 155.

[744] WOLKINSON, *Demands of Congressional Committees for Executive Papers*, supra note 742, at 103.

[745] FISHER, *The Politics of Executive Privilege*, supra note 161, at 3.

[746] WOLKINSON, *Demands of Congressional Committees for Executive Papers*, supra note 742, at 107.

[747] FISHER, *The Politics of Executive Privilege*, supra note 161, at 4.

History shows that the presidents of the United States have deployed a privilege to withhold certain information from Congress since the dawn of the American Republic[748]. As already noted, however, executive privilege assumed an official shape only under the Eisenhower administration[749], which – it has been calculated – appealed to the privilege more than fourthy times[750]. In 1958, then-Attorney General Rogers issued a memorandum that advocated the ability of the President to withhold information from Congress and thus to respond to requests for information by refusing – in whole or in part – the release of the sought material[751]. The memorandum banks on a long series of presidential precedents, most of which pertain to the early decades of the American Republic, to assert executive privilege. This memorandum is vehemently criticized – as was predictable – by Berger[752], who strives to prove the misuse of such precedents to justify the existence of a traditional practice according to which the U.S. presidents refuse the disclosure of information to Congress when they deem it proper to keep some amount of secrecy[753]. The recalled precedents include the underlying affair of one of the leading case in the American legal system – Marbury v. Madison. Berger himself, despite contending that such precedents "run counter to the deep-seated American tradition against secrecy in public affairs,"[754] concedes that the

[748] See MARK J. ROZELL, *Restoring Balance to the Debate over Executive Privilege*: *A Response to Berger*, 8 Wm. &. Mary Bill Rts. J. 541, 552 (2000) (stressing that since George Washington, all presidents have somehow exercised an implicit power to keep information secret and thus have denied access to the legislative branch). See also PRAKASH, *A critical Comment on the Constitutionality of Executive Privilege*, supra note 589, at 1143 (maintained that "[f]rom the earliest days of the Republic, American Presidents have asserted a right to conceal executive communications.")

[749] See SCHLESINGER JR., *The Imperial Presidency*, supra note 146, at 156 (arguing that "when by 1954 the McCarthy inquisition had reached a degree of squalor that exhausted even Eisenhower's forbearance, the administration turned to Wolkinson as ultimate authority.")

[750] See ROZELL, *Executive Privilege. The Dilemma*, supra note 176, at 44.

[751] See U.S. Congress, Senate Committee on the Judiciary, *The Power of the President to Withhold Information from Congress*, 85th Cong., 2nd sess. (Washington, D.C.: Gov't Print. Off., 1958-1959), 2 parts.

[752] See *Executive Privilege*, at 164 (stigmatizing the memorandum as "a farrago of internal contradictions, patently slipshod analysis, and untenable inferences.")

[753] Id., at 164-203.

[754] Id., at 203.

memorandum could boast considerable following amid executive branch officials[755], and in this regard, he refers to a 1971 testimony by William H. Rehnquist before Congress[756].

Between July 27 and August 5, 1971, indeed, the Subcommittee on Separation of Powers of the Committee on the Judiciary of the U.S. Senate held a series of hearings on executive privilege[757], and William Rehnquist was called upon to testify. Rehnquist, then Assistant Attorney General and later Justice of the Supreme Court, begins his testimony by observing that unlike such a subject whose regime has fixed boundaries as the law of real property, executive privilege is concerned with "a broad area of government in which both the legislative and executive branches have claims which are both legitimate and often conflicting."[758] Actually, Rehnquist pinpoints not only Congress but also federal courts as possible requesters and thus as authorities that may need access to information. He defines executive privilege, indeed, as "the constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government."[759] The Constitution expressly provides for neither the power of the President to refuse the release of executive branch information to Congress nor the power of the latter to force the President to disclose the requested material[760]. However, both powers – Rehnquist argues – are implicitly recognized by the Constitution, for they "are firmly rooted in history and precedent."[761] *McGrain v. Daugherty*[762] and *United States v. Reynolds*[763] are mentioned as cases wherein the Supreme Court contended that – respectively – Congress has the power to inquire into the executive branch in addition to that to legislate, and the executive branch enjoys the privilege not to comply with a request for information. Rehnquist notes that such

[755] Id., at 164 (maintaining that the Rogers memo has become – or rather had become by the time Berger wrote his book – "a bible for the executive branch.")
[756] Ibid.
[757] *Executive Privilege: the Withholding of Information by the Executive* – Hearings before Senate the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92nd Cong., 1st Sess., 1971) (Washington, D.C., U.S. Gov't Print. Off., 1971).
[758] Id., at 420 (written statement of William H. Rehnquist).
[759] Id., at 421.
[760] Ibid.
[761] Ibid.
[762] *McGrain*, 273 U.S., supra note 593, at 175.
[763] *Reynolds*, 345 U.S., supra note 479, at 8.

cases did not address legislative-executive information access disputes[764]. In fact, he goes on, "there is no authoritative decision settling the extent to which Congress may compel the production of documents or testimony on the part of members of the executive branch."[765] The main reason for that lies in practice, and thus in the concrete dynamics of the relations between the two branches of the Federal Government. Such dynamics are based on cooperation, as proved by the fact that "[t]he vast majority of requests by congressional committees for testimony from the executive branch are freely complied with […]."[766] Accordingly, Rehnquist concludes that executive privilege arises – as the index of an ongoing conflict between the legislative and executive branches – only in the "very rare case" in which a committee of Congress "after mature consideration feels that information in the possession of the executive branch is essential to the discharge of the legislative function, and where the executive feels that the constitutional principle of separation of powers would be infringed by its furnishing of such information […]."[767]

Since the Eisenhower administration, the presidents have often invoked executive privilege[768] to withhold information from the other two branches of government, albeit not with the same frequency. In a letter dated March 31, 1965, Representative John E. Moss formally requested to President Lyndon B. Johnson to reaffirm the principle, previously established by President Kennedy, that only the Chief Executive may claim the application of the privilege or he must approve of its usage in any event[769]. Moss also underscores the different approach to the privilege by presidents Eisenhower and Kennedy. Under the former – Moss recalls – a report prepared by the House Committee on Government Operations

[764] Ibid. ("Just as McGrain v. Daugherty involved the compulsory process of Congress to directed against a private citizen rather than against a representative of the executive branch, United States v. Reynolds involved compulsory process of the judicial branch rather than the legislative branch.")

[765] *Executive Privilege: the Withholding of Information by the Executive*, supra note 757, at 421.

[766] Ibid.

[767] Id., at 421-422.

[768] Schlesinger, Jr., has noted that the old-fashioned sound of "executive privilege" – and it is quite clear that the Author has inferred such a feature of the sound from the term "privilege" – might have fostered its entrenchment as a legal institution and thus as a means in the hands of presidents to avoid the disclosure of certain information. See SCHLESINGER JR., *The Imperial Presidency*, supra note 146, at 159 ("Executive privilege had the advantage of sounding like a very old term. It passed rapidly political discourse and very soon […] acquired the patina of ancient and hallowed doctrine.")

[769] See LYNDON B. JOHNSON, *Letter to Representative Moss Stating Administration Policy as to Claims of "Executive Privilege"* (April 2, 1965), in Public Papers of the Presidents of the United States, *Lyndon B. Johnson – 1965: Containing the Public Messages, Speeches, and Statements of the President, January 1, to December 31, 1965*, 376 (Washington, D.C., U.S. Gov't Print. Off., 1960).

documented fourthy-four cases in which executive branch officials refused to provide Congress with information on the basis of the 1954 letter mentioned above, and only some of those cases "involved important matters of government," while in most of them Congress was forbidden from gaining access to information and records concerning "routine" executive branch business[770]. A tendency to ensuring the maximum degree of cooperation between the branches of government, on the contrary, pervaded the Kennedy administration, which deployed the privilege with extreme caution[771]. In his reply, President Johnson assures Hon. Moss that he will follow in Kennedy's footsteps with respect to the claim of executive privilege. It is interesting to point out that Moss, then Chairman of the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations, is mostly famous for being one of the main advocates of the Freedom of Information Act.

A watershed in the usage of executive privilege is the Nixon administration, which probably still represents the apex of the range the weapon of executive privilege has ever reached. Richard M. Nixon, indeed, unsuccessfully claimed that the President enjoyed "virtually unchecked discretion to block disclosure of any information related to the executive branch which the President believed contrary to the public interest."[772] In *United States v. Nixon*[773], the President sought to persuade the Supreme Court to accept the theory that the Constitution implicitly recognizes absolute executive privilege, which applies to all presidential communications[774]. It is quite straightforward to understand that admitting an unfettered application of the doctrine of executive privilege would mean to pave the way for potential abuses, as President Nixon's conduct shows[775]. Bad faith, indeed, is what induced the President to adopt such an extreme interpretation of executive privilege, as he was just

[770] Ibid.

[771] Ibid. In a letter dated February 8, 1962, aimed at communicating the refusal to releasing certain information to a Senate subcommittee, President Kennedy clarified that the withholding of information may not be a response to any request of information, and therefore the denial of access may not become an ordinary practice. Ibid.

[772] CLARK, *Executive Privilege*, supra note 667, at 325.

[773] 418 U.S. 683 (1974).

[774] Id., at 703 (reporting that the President's counsel sets forth an interpretation of the Constitution – namely, of its Article II, the article devoted to the President – "as providing an absolute privilege of confidentiality for all Presidential communications.")

[775] See COX, *Executive Privilege*, supra note 726, at 1433 (arguing that if executive privilege were to have an unlimited scope, it would really be "a useful way of hiding inefficiency, maladministration, breach of trust or corruption, and also a variety of potentially controversial executive practices not authorized by Congress.")

trying to prevent a special prosecutor from gaining access to the Watergate tapes and related documents and – more generally – to all records and documents concerning the Watergate scandal[776]. It has been observed that the misuse of the doctrine of executive privilege was so blatant that it resulted in affecting not only the public perception of the privilege[777], but also the resort to the privilege itself by the presidents of the United States[778], at least in the two decades following the Nixon administration. As McPhie has argued, "[i]n the aftermath of the Nixon administration and the Watergate scandal, presidents were reluctant to assert executive privilege."[779] He specifies that both Presidents Ford and Carter expressly claimed the privilege only once, and so did President Bush after the Reagan Presidency, under which formal invocations of the privilege amounted to three. The Author highlights the "flurry of activity involving executive privilege" that characterized the Clinton administration[780]. Rozell, too, provides a similar description of the reluctance of the presidents following Nixon – with the significant exception of Reagan, who sought to bring the institution back to its former glory – to resort to the doctrine of executive privilege to shield information from access by Congress[781]. The general condemnation surrounding President Nixon's patent penchant for secrecy and his attempts to appeal to such a doctrine just to cover up wrongdoing – rectius, White House conversations about the wrongdoing related to

[776] The access to the Watergate tape-recordings and the implications of such access for the legal system brought about multiple litigation, the various pieces of which are mentioned in JAMES M. POPSON, *In re Grand Jury Proceedings: The Semantic of "Presumption" and "Need"*, 32 Akron L. Rev. 155, 160-161 note 34 (1999).

[777] See JEFFREY P. CARLIN, *Walker v. Cheney: Politics, Posturing, and Executive Privilege*, 76 S. Cal. L. Rev. 235, 246 (2002) (arguing that President Nixon's "far-reaching claim [of executive privilege] is a clear example of an abuse of the privilege, and consequently has shaped the negative light in which many people see it.")

[778] See DAWN JOHNSEN, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accomodation*, 83 Minn. L. Rev. 1127, 1127 (1999) (underlining "the shadow cast by President Nixon's Watergate-era abuses on subsequent presidential assertion of executive privilege.")

[779] IAIN R. MCPHIE, *Introduction to Symposium: Executive Privilege and the Clinton Presidency*, 8 Wm. & Mary Bill Rts. J. 535, 536 (2000).

[780] Ibid. Rozell has advanced a parallelism – which actually appears to be excessive – between the usage of executive privilege by Presidents Nixon and Clinton, considered under either administration as abusive. See ROZELL, *Restoring Balance to the Debate over Executive Privilege*, supra note 748, at 578 ("What is problematic in the post-Watergate years is the delegitimization of executive privilege due to Nixon's, and more recently Clinton's abuses.")

[781] See MARK J. ROZELL, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 Minn. L. Rev. 1069, in particular 1072-1117 (1999).

Watergate – ended up acting as a deterrent even for the formal mention of the phrase "executive privilege" by the presidents[782].

Like McPhie, Rozell detects an inversion of the trend in the resort to executive privilege under President Clinton. His policy on executive privilege set out in a 1994 memorandum issued by Special Counsel to the President Lloyd Cutler [hereinafter – the Cutler memo][783] apparently is in line with that of his predecessors. The Cutler memo assures that the maximum extent possible of cooperation will be the criterion the Clinton administration will stick to in answering to the requests for information from Congress, and thereby executive privilege will be invoked only when it is considered to be strictly necessary by the President himself. It is specified, indeed, that claiming the application of executive privilege is a prerogative of the President, and not also of the heads of federal departments and agencies. Yet, Rozell pinpoints in the memorandum a specific sentence destined to "stan[d] out in light of later events."[784] The memorandum, indeed, contains the commitment of the administration not to invoke executive privilege to prevent either Congress or federal courts to gain access to documents "[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials […]."[785] According to Rozell, President Clinton has not honored such a commitment by frequently invoking the privilege[786], even when the withholding of information was manifestly not justified by the need to protect an essential public interest[787]. The most

[782] See ROZELL, *Executive Privilege. The Dilemma*, supra note 176, at 96-107 (reporting a series of cases in which both President Ford and President Carter, on advice of secretaries or aides, strived not to use the term "executive privilege" to achieve the purpose of withholding certain information from Congress, as it was conducting inquiries into the executive branch).

[783] See Memorandum from Lloyd Cutler for All Executive Department for All Executive Department and Agency General Counsel's – Congressional Requests to Departments and Agencies Protected By Executive Privilege (September 28, 1994).

[784] ROZELL, *Executive Privilege and the Modern Presidents*, supra note 781, at 1117.

[785] Memorandum from Lloyd Cutler for All Executive Department for All Executive Department and Agency General Counsel's, supra note 310, ibid.

[786] See ROZELL, *Executive Privilege and the Modern Presidents*, supra note 781, at 1118-1125.

[787] Id., at 1118 (characterizing the claims of executive privilege made by the Clinton administration as "elaborate and mostly indefensible.") See also id., at 1122-1124 (referring in particular to the claim of executive privilege raised by the White House in the Lewinsky investigation). The Author argues that once a federal judge questioned the legitimacy of the invocation of executive privilege in such a case, the White House properly dropped the claim. Judge Johnson – Rozell observes – "in ruling against the President, had nonetheless upheld the legitimacy of the principle of executive privilege and therefore had preserved this presidential power for Clinton's successors." Id., at 1123-

interesting case under the Clinton administration is the one that sprang up in 1994, when the Office of the Independent Counsel (OIC) embarked on an investigation into alleged wrongdoing committed by former Secretary of the Department of Agriculture Mike Espy. Such an affair, eventually brought to court, is important for two main reasons. Firstly, it shows that the scope of the executive privilege doctrine and that of the Freedom of Information Act may overlap. The White House, indeed, invoked not only the presidential communications privilege, but also the so-called deliberative process privilege. While the former sunstantially brings the rationale of executive privilege into the context of the FOIA, the latter is aimed at protecting the exchange of opinions within an agency or between agencies, and constitutes the core of Exemption 5 of the FOIA. Secondly, the D.C. Circuit in a 1997 decision, *In re Sealed Case*[788], had the opportunity to establish the differences between the two types of privilege. As Rozell points out, the Court of Appeals "defined the these two forms of executive privilege more narrowly than did the administration."[789]

E. Political Settlement of Conflicts Between the Legislative and Executive Branches Concerning Access to Information

Political accommodations between the legislative and executive branches are the best way to solve the information access disputes, as they enable those branches to balance on their own account the various interests at stake by means of reciprocal tradeoffs. According to Rozell, this very solution is implied in the separation of powers as devised by the Framers, which could not envision such interbranch conflicts as would arise in the Federal Government. The "dilemma" of executive privilege – the Author argues – must be solved not "with constitutional rectitude [, but rather] on a case-by-case basis, through the normal ebb-and-flow of politics as envisioned by the Framers of the governing system in the United States."[790] Congress is not just the lawmaker, even though the legislative function is "[its] primary province,"[791] but has also the power to inquire into the executive branch. As Woodrow Wilson maintained in his 1885 public law treatise *Congressional Government in*

1124 (referring to Judge Johnson's Order on Executive Privilege, issued May 26, 1998, available at http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/order052898.htm).

[788] 121 F.3d 729 (D.C. Cir. 1997).

[789] ROZELL, *Executive Privilege and the Modern Presidents*, supra note 781, at 1120.

[790] ROZELL, *Restoring Balance to the Debate over Executive Privilege*, supra note 748, at 577-578.

[791] BERNARD SCHWARTZ, *Executive Privilege and Congressional Investigatory Power*, 47 Cal. L. Rev. 3, 9 (1959).

the United States, "quite as important as legislation is vigilant oversight of administration."[792] At the same time, as Strauss has observed, the Constitution assigns the President "sufficient independent authority to serve as an enduring counterweight to the political muscle of Congress."[793] Therefore, the legislative and executive branches were conceived of by the Framers as capable of settling their disputes – especially, the ones concerning access to executive branch information – by reaching a compromise on their own. It also means – Rozell observes – that the search for "constitutional absolutes [is] misguided," since executive privilege is neither a myth, as Berger has argued, nor a privilege with an unlimited scope[794]. Courts are reluctant to intervene in disputes involving the political branches of the Federal Government[795], and when they do, it means that any endeavor of accommodation has turned into a failure. Judicial intervention, indeed, acts as a last resort, which is to deploy whenever the legislative and executive branches did not succeed in finding any settlement to their conflict[796].

Entin has argued that negotiation between the two political branches of the Federal Government for settlement of their disputes – namely, the ones concerning access to executive branch information – is not only "fully consistent with the constitutional design, but it also has important practical advantages."[797] Firstly, political accommodations guarantee a degree of flexibility that is beneficial to the functioning of the Federal Government, while a practice of frequent resort to courts would end up hindering the efficiency of the government. Even if such an effect did not occur in concrete, judicial intervention usually brings about an exasperation of the conflict, for in a lawsuit someone wins and someone else does not, and nobody wants to be the losing party. When a dispute is brought before a court and the parties assume a sort of litigation-oriented mentality – the Author maintains – they tend "to assert maximum positions for short-term advantage in court and to characterize opposing views as illegitimate."[798] An exacerbation of a given conflict

[792] WILSON, *Congressional Government*, supra note 400, at 297.
[793] PETER L. STRAUSS, *The Places of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 641 (1984).
[794] ROZELL, *Restoring Balance to the Debate over Executive Privilege*, supra note 748, at 578.
[795] See SOFAER, (Book Review) *Executive Privilege*, supra note 660, at 292.
[796] See POPSON, *In re Grand Jury Proceedings*, supra note 776, at 159 (characterizing the judiciary as "the ultimate arbiter in the context of constitutional inter-branch disputes.")
[797] JONATHAN L. ENTIN, *Executive Privilege and Interbranch Comity After Clinton*, 8 Wm. & Mary Bill Rts. J. 657, 664 (2000).
[798] Ibid.

may also ensue to the inevitable time elapsing between the resort to a judge and the decision. The Author, however, notes that the Executive complies with most of the requests for information coming from Congress and, especially, from its committees, and even when the Executive initially refuses to release the sought information, the two political branches usually reach a settlement to their information access disputes on their own, thus out of court[799]. Claveloux has argued that the achievement of a settlement to such disputes is fostered by the blurry line that separates the reasons set out by the executive branch to justify the withholding of information from those Congress bases its requests on[800]. Shane has highlighted that over time settlements of information access disputes have been reached even in cases in which the intelligence committees of the House of Representatives and of the Senate required access to sensitive information held by intelligence agencies "without resort to litigation or the threat of litigation."[801]

F. The Supreme Court on Executive Privilege: *United States v. Nixon*

In Nixon, the Supreme Court deliberates on the constitutionality of executive privilege for the first time, and orders President Nixon to produce the Watergate tape recordings for the District Court for the District of Columbia to conduct in camera inspection. The case, indeed, deals with judicial access to material the President sought to withhold to prevent its usage as evidence in a criminal trial. In this case, therefore, the Supreme Court is required to solve neither a legislative-executive information access dispute nor an invocation of state secrets privilege, as a footnote to the decision expressly makes it clear[802]. On March 1, 1974, a grand jury of the United States District Court for the District

[799] Id., at 664-665. The Author mentions three cases occurred under three different administrations – respectively, the Ford, the Carter, and the Reagan administration – in which a denial of access to executive branch information was eventually followed by disclosure, with consequent termination of the dispute. Id., at 665.

[800] RONALD L. CLAVELOUX, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, Duke L. J. 1333, 1351 (1983) (contending that "the imprecision of the demarcation line between conflicting claims of executive secrecy and congressional inquiry encourages both parties to seek a compromise.")

[801] Id., at 666 (referring to PETER M. SHANE, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 Admin. L. Rev. 197, 214-217 (1992)).

[802] *Nixon*, 418 U.S., at 712 note 19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for

of Columbia returns an indictment charging certain persons, all of them either staff members of the White House or members of the Committee for the Re-election of the President, with various federal offences related to the Watergate break-in. The grand jury pinpoints President Nixon, not designated as such in the indictment, as "an unindicted conspirator."[803] On April 18, 1974, the Special Prosecutor the President appointed to investigate the matter files a motion pursuant to Fed. Rule Crim. Proc. 17(c) for a subpoena duces tecum aimed at obtaining the production at trial of certain tapes, memoranda, papers, and transcripts concerning the conversations and meetings of the President enumerated in an attachment to the subpoena. On May 1, by claiming executive privilege, the President files a motion to quash the subpoena. On May 20, the District Court denies the presidential motion. Not only does the Court reject the President's assertion that the conflict between him and the independent special prosecutor is not justiciable for being an "intra-executive" conflict, which thus lies merely within the executive branch; it also recognizes the full authority of the judiciary to decide over a presidential claim of executive privilege. Accordingly, the District Court orders an *in camera* examination of the subpoenaed material, but the President impugns the order before the Court of Appeals, which grants the petitions filed by the two parties respectively on May 24 and June 6: the Special Prosecutor's petition for a writ of certiorari before judgment, and the President's cross-petition for the same writ but challenging the grand jury action.

Firstly, the Supreme Court rejects its alleged lack of competence to decide the case. The President's counsel interprets the controversy at issue as a "jurisdictional," intra-branch dispute between a subordinate officer – the independent Special Prosecutor – and the President of the United States. Since they both belong to the executive branch – the counsel argues – the dispute equates to the one that may arise between two committees of Congress[804]. Such an argument is based on a typical feature of the American legal system, wherein the executive branch has "exclusive authority and absolute discretion to decide whether to prosecute a case," and thus it is up to the President to decide ultimately what evidence is to be used in a given criminal case[805]. The Special Prosecutor – the President's

information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privileged of confidentiality and the constitutional need for relevant evidence in criminal trials.")

[803] Id., at 693.

[804] Ibid.

[805] Ibid. Pursuant to Article II, Section 2, Const., the U.S. Attorney General has the power to conduct the criminal litigation of the Federal Government. Id., at 694.

counsel argues – has been delegated some powers, yet the President keeps the prerogative to refuse disclosure of material to any of his subordinates in the executive branch. The controversy would end up consisting in a political question[806]. The Supreme Court rejects such a reasoning by relying upon the traditional principle that formally qualifying a dispute as an intra-branch one does not suffice to exclude federal jurisdiction. As was maintained in *United States v. ICC*[807], indeed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."[808] The Supreme Court also finds that by denying the President's motion to quash the subpoena, the District Court has complied with Rule 17(c), and the Special Prosecutor has provided adequate showing to justify a subpoena for production of material before trial[809].

Then, the Supreme Court addresses the claim of executive privilege by the President. As noted above, the President's counsel asserts the alleged existence of absolute executive privilege capable of covering any confidential[810] conversation between a U.S. President and his close advisors, whose production at trial is considered to be against the public interest. The Court starts off by recalling that an entrenched principle, first established in the leading case *Marbury v. Madison*[811], recognizes that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[812] In *Baker v. Carr*, the Supreme Court held that solving a conflict of authority between the branches of government implies "a delicate exercise in constitutional interpretation, and is a responsibility of [the Supreme] Court as ultimate interpreter of the Constitution."[813] The sharing of constitutional powers between the branches of the Federal Government – the Supreme Court explains in *Nixon* – may not exceed such extent as is consistent with the separation of powers and "the checks and

[806] The President's Counsel refers to *Baker v. Carr*, 369 U.S. 186 (1962), since there is a "textually demonstrable" grant of power under Article II Const. Ibid.
[807] 337 U.S. 426 (1949).
[808] Id., at 430.
[809] *Nixon*, 418 U.S., at 702.
[810] See RAOUL BERGER, *The incarnation of Executive Privilege*, 22 UCLA L. Rev. 16, 29 (1974) (maintaining that President Nixon employed the concept of confidentiality as a "vehicle for the cover-up of criminal acts and conspiracies by his aides, an instrument he repeatedly employed for the obstruction of justice.")
[811] 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).
[812] Id., at 177.
[813] 369 U.S., at 211.

balances that flow from the scheme of a tripartite government."[814] That being said, the Court concedes that confidentiality is necessary not only between the President and his advisors, but – more generally – for any individual involved in a decision-making process, as complete disclosure turns out to be a deterrent for the unfettered expression of opinions within such a process[815]. As for the need for secrecy the President's counsel invokes, it is noted that "[t]here is nothing novel about government confidentiality," since the meetings of the Constitutional Convention of 1787 themselves "were conducted in complete privacy."[816] According to the Special Prosecutor, the Constitution does not ensure to presidential communications a formal protection from disclosure that could be equated to the protection that is instead granted to the Members of Congress under the Speech or Debate Clause[817]. The Court points out that the existence of implicit powers has long been acknowledged[818]. Therefore, the protection of the confidentiality of presidential communications enjoys "constitutional underpinnings" as an implied power stemming from the formulation of Article II Const[819]. However, neither such constitutional underpinnings nor the doctrine of separation of powers – the Supreme Court argues – "can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[820] On the one hand, the interest in candor of opinions given to the President by his advisors is of high value and accordingly has a public nature. On the other hand, it has to be balanced with other interests, such as – in the specific case – the interest of the District Court to gain access to

[814] *Nixon*, 418 U.S., at 704 (referring to *The Federalist No. 47*, 313 (James Madison) (S. Mittell ed., 1938). Such an extent of power sharing allows, for instance, the judicial and the executive branches to be involved in the exercise of the veto power, as well as Congress and the Judiciary to be empowered to override a presidential veto. Ibid.

[815] Id., at 705 ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.")

[816] Id., at 705 note 15 (referring to FARRAND, 1 *The Records of the Convention*, supra note 144, at xi-xxv). The records of the Convention remained sealed until 1818. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). As it has been observed, most of the Framers were perfectly aware that "without secrecy no constitution of the kind that was developed could have been written." Ibid. (referring to CHARLES WARREN, *The Making of the Constitution*, 134-139 (Little, Brown and Co., Boston, 1937)).

[817] *Nixon*, at 705-706 note 16.

[818] Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, it has been acknowledged and applied a principle according to which the grant of a given power to one of the branches of government includes what is "reasonably appropriate and relevant to the exercise of [the] granted power […]." *Nixon*, 418 U.S., at 706 note 16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)).

[819] Id., at 705-706.

[820] Id., at 706.

the material concerning certain presidential communications for *in camera* inspection. The District Court is supposed to apply all the guarantees of protection from indiscriminate dissemination that *in camera* proceedings require. Such a judicial interest prevails unless – the Supreme Court holds – there is "a claim of need to protect military, diplomatic, or sensitive national security secrets […]."[821] Granting an absolute privilege to the conversations and communications between the advisors and with the President – the Supreme Court continues – would result in impeding the execution of the functions Article III Const. vests in the judicial branch. The Framers divided the Federal Government into "three co-equal branches," in each of which they allocated a portion of the sovereign power, and yet "the separate powers were not intended to operate with absolute independence."[822] Therefore, recognizing an implicit power of the President to consider confidential, on the basis of "no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions," the material the access to which enables a federal court to do justice in criminal proceedings would end up undermining the powers vested in the judicial branch by Article III Const.[823]

Furthermore, the Supreme Court digs deeper to pinpoint the core of the presidential communications privilege. It is noted that the President has legitimate expectation that his conversations and correspondence be treated as confidential, as private citizens do by virtue of their right to privacy. The confidentiality the President invokes, however, has an added value, constituted by the need to safeguard "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making."[824] A President and his aides and advisors – the Supreme court contends – "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."[825] The presidential communications privilege, therefore, is deemed essential to the functioning of the Federal Government – namely, of the executive

[821] Ibid.

[822] Id., at 707. It is also quoted a passage from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), wherein it is argued that the Framers meant the three sovereign branches to interact and cooperate in practice so as to create "a workable government." Id., at 635 (Jackson, J., concurring). The branches are enjoined "separateness but interdependence, autonomy but reciprocity." Ibid.

[823] *Nixon*, 418 U.S., at 707.

[824] Id., at 708.

[825] Ibid.

branch – and "inextricably rooted in the separation of powers under the Constitution."[826] Recently, it has been observed that since the Nixon opinion on executive privilege rests upon the separation of powers, it means that the same position is to be applied to the deliberative process privilege, i.e., to the protection of intra-agency or inter-agency communications not directly related to the President and his aides[827]. Such a conclusion – it is argued – can be inferred from the very Nixon opinion, which, in a footnote[828], quotes a passage from a 1966 decision of the District Court for the District of Columbia – *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*[829]. The subpoenaed material in that case concerned memoranda and communications within the Department of Justice, and the withheld documents contained mainly "opinions, recommendations and deliberations pertaining to decisions the Department was required to make as to litigation and other matters […]."[830] Therefore, the claim of privilege in that case involved "levels of executive communication lower than that of the President."[831] According to the District Court, freedom of expression and communication can be effective within the executive branch only if "the specter of compelled disclosure" is removed[832]. Government, indeed – it is added – as well as private citizens, "needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning."[833]

G. President Obama and Executive Privilege: The "Operation Fast and Furious"

President Obama, too, invoked executive privilege with respect to the so-called "Operation Fast and Furious." This name identifies a gun-running program, begun on October 31, 2009, who stated purpose was to track and monitor illegal weapons trafficking along the Southwestern U.S. border. The program was substantially a renewal of a former one, "Operation Wide Receiver," established under the George W. Bush administration.

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[826] Ibid.

[827] See EDWARD J. BOULSTEIN, *Individual & Group Privacy*, 164 (Transpaction Publishers, New Brunswick and London, 2004).

[828] *Nixon*, 418 U.S., at 708 note 17.

[829] 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967).

[830] 40 F.R.D., at 323.

[831] BOULSTEIN, *Individual & Group Privacy*, supra note 827, ibid.

[832] 40 F.R.D., at 325.

[833] Ibid.

Both programs were performed by a law enforcement agency within the U.S. Department of Justice – the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The Committee on Oversight and Government Reform took on an investigation over the Operation, and directed requests for information at the Department of Justice. On June 20, 2012, the Deputy Attorney General sent the Chairman of the Committee a letter by which he communicated President Obama's claim of executive privilege. The privilege was formally invoked at the very moment in which the Committee was threatening to hold Attorney General Eric Holder in contempt for failing to comply with a 2011 subpoena issued to obtain the release of the same information. The case, therefore, boils down to a typical legislative-executive information access dispute. From details of this affair it can be inferred that a congressional subpoena aimed at gaining information on activities carried out by the executive branch falls within the scope of administrative law, at least according to European standards. Even though the affair implies a relation between the two political branches of the Federal Government, indeed, the request for information made by the Committee on Oversight and Government Reform of the House of Representatives was concerned with business conducted by a federal agency in the law enforcement domain.

The affair may be summed up as follows[834]. On January 27, 2011, Sen. Grassley writes a letter to AFT Acting Director Kenneth E. Melson informing him that the Senate Judiciary Committee has received reports that the ATF approved of weapons trafficking along the southwestern U.S. border. In a second letter, Sen. Grassley refers to the danger of retaliation that some AFT agents are subject to for cooperating with the Senator himself and his staff in the gathering of information on the affair. On February 4, 2011, Assistant Attorney General Ronald Weich responds to Grassley's letters by stating that the ATF did not sanction the sale of weapons and their entry into Mexico. However, it has been noted that the wording of the letter, not particularly clear, does not expressly deny the possibility that the weapons were brought to Mexico[835]. On February 28, Attorney General Holder directs the Office of Inspector General of the Department of Justice to conduct an investigation over the Operation Fast and Furious. In the course of 2011, the House Oversight Committee, too, takes on an investigation on the matter. On March 16, 2011, indeed, Chairman of the House Oversight Committee Issa writes to Melson announcing a

[834] The reconstruction of the affair is based on the account provided by Fisher. See LOUIS FISHER, *Obama's Executive Privilege and Holder's Contempt: "Operation Fast and Furious"*, 43 Pres. Stud. Quart. 167 (2013).
[835] Id., at 170.

congressional investigation over Operation Fast and Furious and requesting documents and information thereupon. The committee also issues a congressional subpoena, aimed at enforcing the release of such documents and information and at obtaining testimony. On May 4, 2011, the staff of the committee goes to the Department of Justice to examine documents *in camera*, and finds out that the documents have been redacted. On October 11, 2011, the committee issues a subpoena for documents generated both before and after February 4. Attorney General Holder produces some records, but declines to produce others. In a letter dated June 20, 2012, Deputy Attorney General James M. Cole states that the President invoked executive privilege over documents dated after February 4, 2011, because their disclosure would reveal the Department of Justice's internal deliberative process. The assertion of executive privilege follows a decision of the House of Representatives to vote on a contempt motion against Holder on June 28. The June 20 letter stresses that the documents the House Oversight Committee requested are concerned with internal communications adopted in the course of the Department of Justice's decision-making process aimed at formulating a response to the congressional investigation – and to a similar inquiry conducted by a magazine – into the Operation Fast and Furious. According to the letter, the release of such documents will result in "inhibit[ing] the candor" of deliberations within the Department of Justice with respect to the affair and in "significantly impair[ing] the Executive Branch's ability to respond independently and effectively to congressional oversight."[836] Furthermore, the disclosure of such documents – the letter continues – will violate the separation of powers as provided for in the Constitution. President Obama, therefore, denies to Congress access to the requested information by invoking the presidential communications privilege, which however does not operate at a close level to the President in this case. The allegedly privileged communications, indeed, occurred within the Department of Justice[837].

The House Oversight Committee filed a civil action to enforce its October 2011 subpoena and thus to gain the requested information. In 2013, the District Court for the District of Columbia rejected the Attorney Genral's motion to dismiss the case[838]. Firstly,

[836] Letter from Dep. Att'y Gen. James Cole to Chairman Darrell Issa (June 20, 2012), p. 4 (quoted in *Comm. on Oversight and Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 6 (D.D.C. 2013)).

[837] See RILEY T. KEENAN, *Executive Privilege as Constitutional Common Law: Establishing Ground Rules In Political-Branch Information Disputes*, 101 Corn. L. Rev. 223, 254 note 214 (2015) (observing that "[w]hether the President has the power to assert the privilege "on behalf" of a cabinet secretary is […] an unsettled issue.")

[838] *Holder*, 979 F. Supp., at 2.

the Court quotes the D.C. Circuit, which, in a 1976 decision[839], stated that "the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict."[840] Secondly, it is recalled that five years before, the same court "concluded in a persuasive opinion that it had jurisdiction to resolve a similar clash between the branches [of government]."[841] The previous case decided by the Court was concerned with President George W. Bush's invocation of executive privilege to protect the deliberative nature – and the consequent confidentiality, according to the Executive – of communications between the Department of Justice and the White House concerning proposals to dismiss and replace some U.S. Attorneys[842]. This assertion of the privilege was neither the first nor the last one under the Bush administration[843]. Thirdly, the District Court for the District of Columbia notes that at the present stage of the proceedings, it has only been called upon to determine whether it has jurisdiction to hear the case, and it has concluded that it does. Therefore, the opinion – the Court underscores – "does not grapple with the scope of the President's privilege: it simply rejects the notion that it is an unreviewable privilege when asserted in response to a legislative demand."[844] The Court bases its determination on the principle established in *Nixon* that executive privilege is not absolute.

II. The Freedom of Information Act (FOIA)

A. Enactment of the FOIA

The Freedom of Information Act was signed into law by President Lyndon B. Johnson on July 4, 1966[845]. It is commonly said that such a statute became effective one year later, though in reality the train of events that eventually led to the codification of FOIA in

[839] *United States v. American Telephone and Telegraph Company*, 551 F.2d 384 (D.C. Cir. 1976).
[840] Id., at 390.
[841] *Holder*, 979 F. Supp., at 4 (referring to *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008)).
[842] See ROSENBERG, *Presidential Claims of Executive Privilege*, supra note 143, at 24-33.
[843] Id., at 33-34.
[844] Id., at 4-5.
[845] Pub. L. No. 89-487, 80 Stat. 250 (July 4, 1966).

the U.S. Code turns out to be not as linear as one might suppose. Public Law No. 89-487[846], the statute that President Johnson signed on July 4, 1966,[847] was supposed to enter into force on July 4, 1967, yet never became effective law directly. It was codified only by means of the enactment of a different statute. After the enactment of a temporary version of the FOIA, a different statute of 1966 inserted a title 5 into the U.S. Code as a collection of existing statutes concerning the organization and personnel of the executive branch[848]. The original section 552 of title 5, as provided for by this 1966 statute, addressed the publication of agency information and records. Subsection (b), in particular, required that agencies publish in the Federal Register information on their organization and on methods of performing their functions, therefore on the proceedings they carried out, on substantive rules, and on statements of general policy. The section, however, began by setting down two general categories of cases in which the prescriptions of the section itself did not apply. These categories appear to recall only vaguely the exemptions of the FOIA. Agencies were not subject to the obligations of publication provided for in the section whenever they performed either a function "requiring secrecy in the public interest,"[849] or administrative business pertaining to exclusively "the internal management of an agency."[850] Furthermore, subsection (c) directed agencies to publish or make available otherwise all final opinions or orders in the adjudication of cases, unless there was "good cause" to keep them confidential. Finally, subsection (d) excluded the general availability of records, as agencies had to make them available only "to persons properly and directly concerned, except information held confidential for good cause found." This provision shows how far the original section 552 was from the rationale underlying the FOIA. However, section 551 of title 5, U.S. Code, brought in by Public Law No. 89-554, already included the definition of agency that would

[846] The statute was based on a bill introduced in the Senate on February 17, 1965, during the First Session of the 89th U.S. Congress – S. 1160. The Senate and the House of Representatives passed the bill – respectively – on October 13, 1965, and on June 20, 1966.

[847] See HAROLD C. RELYEA, *Federal Freedom of Information Policy: Highlights of Recent Developments*, 26 Government Information Quart. 314, 314 (2009) (noting that not only all departments and agencies of the Federal Executive refused to support the FOIA, but President Johnson, too, signed it into law with no small amount of reluctance.")

[848] Pub. L. No. 89-554, 80 Stat. 383 (September 6, 1966) – "An Act to enact title 5, United States Code, "Government Organization and Employees," codifying the general and permanent laws relating to the organization of the Government of the United States and to its civilian officers and employees."

[849] Section 552(a)(1).

[850] Section 552(a)(2).

be used – and still is – to identify the scope of the FOIA. Then, in 1967, Congress enacted a new statute, Public Law 90-23, expressly aimed at amending section 552 of title 5, U.S. Code, and at codifying the FOIA[851]. Section 3 of this act expressly repealed Public Law No. 89-487, thereby replacing the original version of the FOIA, and section 4 fixed the same date as the original FOIA for the entry into force of the act. Therefore, despite being formally replaced by the enactment of a new act, the FOIA became effective – as originally established – on July 4, 1967.

B. A Statute Aimed At Overcoming the Disappointing Experience with Section 3 of the Administrative Procedure Act

The main purposes of the original FOIA, as stated in the long title of the act, was to amend section 3 of the Administrative Procedure Act of 1946 [hereinafter – APA][852], and "to clarify and protect the right of the public to information […]." Congress, indeed, passed the FOIA to ensure citizens a much broader ability to gain access to records of federal departments and agencies than the "Public Information" section of the APA[853] did. Senate Report No. 813 accompanying S. 1160[854], i.e., the bill containing the original version of the FOIA, pinpointed the main flaws emerging both from the formulation of Section 3 APA and from its application in practice. First, the report quotes a famous statement of James Madison that reads as follows: "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or, perhaps both."[855] It is of great importance – the report continues – "an information policy of full disclosure,"[856] capable of implementing Madison's warning, especially in consideration of the large number of departments and agencies that make up the federal executive branch. A policy of full disclosure serves the purpose to ensure the democracy of such a huge administrative

[851] Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967) – "An Act to amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487."
[852] Pub. L. No. 79-404, ch. (chapter) 324, 60 Stat. 237 (June 11, 1946).
[853] Section 3 APA, codified at 5 U.S.C. § 1002 (1964 ed.).
[854] S. Rep. No. 813, 89th Cong., 1st Sess. (1965), reprinted in SUBCOMM. ON ADM. PRAC. AND PROC. OF THE SENATE COMM. ON THE JUDICIARY, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, 93rd Cong., 2nd Sess. [hereinafter – *1966 Source Book*], 36 (Comm. Print, 1974).
[855] *Letter from James Madison to W. T. Barry* (August 4, 1822), in 9 *The Writings of James Madison*, 103 (Gaillard Hant ed., New York, 1900).
[856] S. Rep. No. 813, supra note 854, at 38.

apparatus, wherein officials and employees in general do not enjoy electoral legitimation, as they are not directly accountable to the people. The APA, however, did not ensure "an informed electorate," which instead is "vital to the proper operation of a democracy […]."[857] Despite being titled "Public Information," therefore, section 3 APA did not embody the concept of "popular information" Madison was referring to. Indeed, the report notes that during congressional hearings aimed at examining the application of the APA with respect to openness, many witnesses testified that section 3 "has been used more as an excuse for withholding [information] than as a disclosure statute."[858] The report finds that this section "is full of loopholes which allow agencies to deny legitimate information to the public."[859]

In particular, Section 3(a) APA required agencies to publish in the Federal Register a series of information and documents: firstly, information describing their "central and field organization," including delegations of final authority[860]; secondly, statements setting out the methods by which agencies perform their functions and carry out proceedings, as well as instructions outlining the scope and contents of administrative papers; thirdly, substantive rules authorized by a statute of Congress, and statements of general policy or interpretations adopted by agencies "for the guidance of the public […]."[861] Under subsection (b), agencies had to publish or make available to citizens all final opinions or orders issued in the adjudication of cases, unless there was "good cause" to keep them confidential and not to cite them as precedents, as well as all rules. In addition, subsection (c) provided that unless a statute established otherwise, official records were to be made available only "to persons properly and directly concerned except information held confidential for good cause found." Section 3 APA, however, did not apply when agencies perform a function "requiring secrecy in the public interest," or when they conduct business in "any matter relating solely to the internal management" of agencies[862]. The formulation of Section 3 APA turns out to be almost identical to the original section 552 of title 5, U.S. Code.

The Senate report criticizes the wording of section 3 APA for being too generic. Firstly, the report maintains that unclear phrases such as "requiring secrecy in the public

[857] Ibid.

[858] Ibid. See, similarly, *EPA v. Mink*, 410 U.S. 73, 79 (1973) (noting that section 3 APA "was generally recognized as falling far short of its disclosure goals, and came to be looked upon more as a withholding statute than a disclosure statute.")

[859] S. Rep. No. 813, supra note 854, at 38.

[860] Section 3(a)(1) APA.

[861] Section 3(a)(3) APA.

[862] Section 3, introductory sentence, APA.

interest"[863] and "required for good cause to be held confidential" have justified the withholding of information on many occasions "only to cover up embarrassing mistakes or irregularities […]."[864] Secondly, the wording of Section 3(c) has been deemed to imply "a double-barreled loophole,"[865] consisting in agencies' ability to withhold information in the event of good cause and when a request for information is presented by persons "not properly and directly concerned." The report comes to the conclusion that section 3 APA hardly promoted people's access to information held by the executive branch, and fostered secrecy, on the contrary. This section, indeed – the report observes – tends to be "cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish to disclose."[866] Agency officials are substantially authorized to keep almost any record confidential "under color of law" by the wording of section 3 APA, which contained "vague standards – or, more precisely – lack of standards […]."[867]

The report contends that unlike section 3 APA, the FOIA intends to establish "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language […]."[868] As the Court of Appeals for the Second Circuit pointed out in *Rose v. Dep't of the Air Force*[869], Congress devised the FOIA as a reaction to the disappointing practice under section 3 APA as to the level of openness, and thus the cardinal purpose of the FOIA was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[870] The Supreme Court itself made it clear in *Milner v. Dep't of the Navy*[871] that Congress "enacted FOIA to overhaul the public-disclosure section of the [APA]."[872] The change in mindset the FOIA demanded of agencies is highlighted by Attorney General Ramsey Clark in the foreword to his memorandum of

[863] The report notes that a definition of public interest as a concept to call upon to justify the withholding of information could be found neither in the APA nor in its legislative history, and the APA did not provide for specific authority to check the usage of such a concept to keep certain information or documents secret. S. Rep. No. 813, supra note 854, at 40.
[864] Id., at 38.
[865] Id., at 40.
[866] Ibid.
[867] Ibid.
[868] Id., at 38.
[869] 495 F.2d 261 (2nd Cir. 1974).
[870] Id., at 263.
[871] 131 S. Ct. 1259 (2011).
[872] Id., at 1262.

June 1967 on public information [hereinafter – Clark memo][873]. After recalling that "[n]othing so diminishes democracy as secrecy," the Clark memo underlines that Public Law No. 89-487, the original version of the FOIA, does not boil down to a mere confirmation of the objectives and principles of section 3 APA, but on the contrary "imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information."[874] Under the FOIA – the Clark memo observes – "disclosure is a transcendent goal," which may only yield to such "compelling" interests in secrecy as are embodied by the exemptions to freedom of information enumerated in the statute[875]. Reference is made, in particular, to the interest in preserving the privacy of citizens. Privacy is conceived of as a supreme value that tends to clash with the right to know and thus must be protected in the different contexts in which it may come up in the handling of public records, namely with respect to medical and personnel files and tax reports or in the form of trade secrets[876]. Furthermore, the Clark memo identifies – with laudable capacity of conciseness – the key elements of the FOIA. Such elements are the following: the disclosure of federal departments' and agencies' records is "the general rule, not the exception;" the right of access is granted to any person, and therefore the reasons and interests that prompt an individual to file a request for information are irrelevant; the burden of proof concerning the withholding of information lies on the agency; individuals claiming that the withholding of certain information is illegitimate have "a right to seek injunctive relief in the courts;" the executive branch must radically change "[its] policy and attitude" towards the release of records and documents to the public[877].

[873] Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, reprinted in SUBCOMM. ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS AND SUBCOMM. ON ADM. PRAC. AND PROC. OF THE SENATE COMM. ON THE JUDICIARY, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502). Source Book: Legislative History, Texts, and Other Documents*, 94th Cong., 1st Sess. [hereinafter – *1975 Source Book*], 12 (Comm. Print, 1975).

[874] Ibid.

[875] Ibid.

[876] Id., at 13.

[877] Ibid.

C. Main Amendments to the FOIA

Congress approved many amendments to the FOIA over time, yet only a few of them were significant as to the scope and content of the act. Great importance has the passage of the 1974 FOIA Amendments Act[878], which addresses both substantial and procedural aspects. As to the former, the scope of the exemptions on national security and law enforcement was considerably restricted. As to the latter, the ability of the courts to conduct *in camera* inspection of withheld material was significantly strengthened, and amendments were also brought to the provisions concerning fees and time limits to respond to FOIA requests. In addition, the act explicitly provides for the segregability of material subject to a given request, with physical separation of the portions to protect from those to release. Then, the Freedom of Information Reform Act of 1986[879] addresses the access to law enforcement information, a matter that is thus modified for the second time, only that this time the amendments mend in the opposite direction. Indeed, not only is the scope of the exemption broadened – in the advantage of agencies' invocation of secrecy – but the statute also devises a brand new mechanism for protection of law enforcement information by providing for specific exclusions. The next significant step is the Electronic Freedom of Information Act of 1996[880], which is mainly devoted to electronic records and proactive disclosures. Furthermore, the Intelligence Authorization Act for Fiscal Year 2003[881] brings in a single amendment to the FOIA, which however has major implications for the philosophy the entire act is based on – full disclosure. Such disclosure implies that access to department and agency records not be restricted on the side of the requester, because otherwise the right to know would not be granted to any person. The Intelligence Authorization Act for Fiscal Year 2003 makes an amendment affecting this very aspect of the FOIA. Section 312 of the act[882], indeed, prohibits agencies of the Intelligence Community from releasing records in response to FOIA requests that come from a foreign government or an international governmental organization, whether a foreign government files a request directly or by means of a representative. In such cases, therefore, contrary to the rationale of the entire FOIA, the identity of the requester is what matters, as it leaves the agency with no choice but to deny access to the requested information.

[878] Pub. L. No. 93-502, 88 Stat. 1561 (November 21, 1974).
[879] Pub. L. No. 99-570, 100 Stat. 3207 (October 27, 1986).
[880] Pub. L. No. 104-231, 110 Stat. 3048 (October 2, 1996).
[881] Pub. L. No. 107-306, 116 Stat. 2383 (November 27, 2002).
[882] Codified at 5 U.S.C. § 552(a)(3)(E).

The OPEN Government Act of 2007[883] addresses a series of procedural provisions, some of which are aimed at strengthening the position of the requester. Indeed, requests that take longer than ten days to be processed have to be assigned a tracking number[884], by using which the requester is enabled to follow step-by-step the procedure his or her request is going through. The requester, indeed, is given specific contacts within the agency to reach out to in order to get updates on the status of the request[885]. In handling the status of requests and to prevent an excessive amount of backlog, FOIA Public Liaisons play a pivotal role. Under section 10 of the OPEN Government Act of 2007, they bear responsibility "for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes."[886] They are also statutorily designed as supervisory officials an individual may turn to in order to make complains or raise issues with the way his or her FOIA request has been treated by the competent office[887]. The same section entrusts a similar but broader function to promote transparency to the Chief FOIA Officer, who is supposed to ensure "efficient and appropriate compliance" with the FOIA[888], and "keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing [the FOIA]."[889] Section 6 of the OPEN Government Act of 2007, instead, addresses time limits for agencies to comply with FOIA requests. The date on which a given request is first received by the appropriate office of the agency marks commencement of the 20-day period during which the request is to be processed and satisfied[890]. Only two situations allow the agency to toll such a period: when the agency needs further information from the requester, and makes a specific request accordingly[891]; and when a confrontation between the parties is necessary for fee assessment, but the tolling period is over as soon as the individual provides the clarification needed[892]. Furthermore, section 3 defines the term "a representative of the news media" for purposes of determination of fees to charge by piercing into each single element

[883] Openness Promotes Effectiveness in Our National Government Act of 2007 [hereinafter – OPEN Government Act of 2007], Pub. L. No. 110-175, 121 Stat. 2524 (October 2, 2007).
[884] Section 7, OPEN Government Act of 2007 (codified at 5 U.S.C. § 552(a)(7)(A).
[885] 5 U.S.C. § 552(a)(7)(B)).
[886] Section 552(l).
[887] Ibid.
[888] Section 552(k)(1).
[889] Section 552(k)(2).
[890] Section 552(a)(6)(A)(ii), second part.
[891] Section 552(a)(6)(A)(ii)(I).
[892] Section 552(a)(6)(A)(ii)(II).

of this term[893]. Even though the amendments brought in by the OPEN Government Act of 2007 are concerned with procedural aspects of the FOIA, some observations on substance of the FOIA are set out in the findings, placed – as usual – at the beginning of the statute. After pointing out that the American Government – namely, the Federal Executive – has at times failed to follow the essential criterion that requires to apply the FOIA so as to make disclosure prevail over secrecy[894], section (2)(6) of the OPEN Government Act of 2007 underlines the importance of constant oversight over FOIA implementation by Congress. Such oversight – it is argued – enables Congress to determine whether and to what extent the FOIA needs amending and improving "to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know.'"

The OPEN Government Act of 2007 was the last statute bringing in a vast range of amendments to the FOIA, which however was amended in 2009, as well. The OPEN FOIA Act of 2009 addresses, in particular, Exemption 3, i.e., the exemption to freedom of information that allows departments and agencies to withhold information pursuant to nondisclosure provisions contained in statutes other than the FOIA. The act of 2009 adds a requirement to the two ones already provided for under the former version of the FOIA. This new requirement identifies the date of enactment of the OPEN FOIA Act of 2009 as a sort of watershed for the application of exemption 3. Indeed, statutes approved by Congress after such a date – not those approved on an earlier date – may be invoked by agencies to withhold material pursuant to Exemption 3 of the FOIA only if such statutes make express reference to this exemption[895]. Finally, I deem it proper to note that in recent years, various bills have been introduced in the two Houses of Congress to increase executive branch transparency by amending the FOIA. The proposed legislation currently under consideration in the two Houses takes up, as to content and language, the one examined in the previous Congress – the 113rd Congress[896].

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[893] Section 552(a)(4)(A)(ii).

[894] Section (2)(5), OPEN Government Act of 2007.

[895] 5 U.S.C. § 552(b)(3)(B).

[896] In the Senate, on February 2, 2015, Sen. John Cornyn introduced the FOIA Improvement Act of 2016 (S. 337; by practice, the year mentioned in the title of a bill may be updated depending on the time necessary for consideration and approval of the bill itself). The content of this bill is similar to that of S. 2520, considered in the previous Congress. The Senate passed the bill on March 15, 2016, with an amendment by unanimous consent. In the House, Representative Darrel E. Issa, who had already sponsored H.R. 1211 during the 113th Congress, introduced the FOIA Act (H.R. 653) on

D. The Federal Register and the Code of Federal Regulations

1. The Federal Register

Some of the proactive disclosures agencies are required to engage in by the FOIA consist in the publication of diverse documents in the Federal Register. What is the Federal Register? In 1935, Congress passed the Federal Register Act[897], currently codified at sections 1501 et seqq. of title 44, U.S. Code, which was aimed at ensuring "the custody of federal proclamations, orders, regulations, notices, and other documents […]." The Federal Register is the official journal of the executive branch of government. Section 4 of the Federal Register Act, indeed, excluded from publication business conducted by the other two branches[898]. The Federal Register, the first issue of which came out on March 14, 1936,[899] is published Monday through Friday, except on federal holidays, and contains documents of the executive branch[900]. Section 1502 entrusts the custody of the documents to be published in the Federal Register to the Archivist of the United States, who instead shares with the Director of the U.S. Government Publishing Office – an authority traditionally referred to as the "Public Printer," the responsibility for the printing and distribution of such documents[901]. The Archivist "act[s] through" the Office of the Federal Register (OFR)[902], which belongs to the National Archives and Records Administration (NARA). The OFR is charged with

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February 2, 2015. On January 11, 2016, the House passed the bill on motion to suspend the rules. The next day, the bill got to the Senate, and was referred to the Senate Committee on the Judiciary. See WENDY GINSBERG, *Freedom of Information Act Legislation in the 114th Congress: Issue Summary and Side-by-Side Analysis*, CRS Report for Congress (April 21, 2016), p. 3. For a comparison on the content of the two bills and an analysis of their implications, id., at 4-14.

[897] Pub. L. No. 74-220, 49 Stat. 500 (July 26, 1935).

[898] Section 1501 provides that this section and the others containing the codification of the Federal Register Act applies to federal agencies, which include the U.S. President, and any department, agency, institution, commission belonging in the executive branch of the Federal Government. It is also expressly stated what could already be inferred from the doctrine of separation of powers: Neither the legislative nor the judicial branch falls within the definition of "federal agency" pursuant to the Federal Register Act.

[899] See RICHARD J. MCKINNEY, *A Research Guide to the Federal Register and the Code of Federal Regulations*, 46 Law Library Lights 10, 10 (2002).

[900] Section 1501 defines documents, for purposes of publication in the Federal Register, as "any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency."

[901] Section 1504.

[902] Section 1502.

compiling all rules and regulations adopted by federal agencies, as well as presidential proclamations and executive orders. The overall structure of the daily Federal Register comprises four categories of material, i.e., four categories of types of entry: Presidential Documents; Rules and Regulations; Proposed Rules; Notices. Section 1506 assigns the Administrative Committee of the Federal Register[903] the function to issue regulations concerning both the publication of material and the printing of the Federal Register. Such regulations, for instance, determine how the certification of copies required pursuant to section 1503 is to be done[904], and establish "the manner and form in which the Federal Register shall be printed, reprinted, and compiled, indexed, bound, and distributed."[905]

Section 1505 enumerates the documents to be published in the Federal Register. Subsection (a) identifies three different categories. Firstly, presidential proclamations and executive orders are to be published in the Federal Register unless their effectiveness is not *erga omnes*, and thus they do not have "general applicability and legal effect," or are directed at federal agencies, and thereby their binding effect concerns only agency personnel[906]. The mandatory content of the Federal Register also includes documents, the general applicability and legal effect of which is determined by the President, as well as documents, the publication of which is required by an act of Congress. Furthermore, the Federal Register contains documents "authorized to be published by regulations prescribed under this chapter," and thus namely by regulations issued by the Administrative Committee of the Federal Register, provided that the President gives his formal approval to inserting such documents or classes of documents in the Federal Register[907]. Under section 1507, the publication in the Federal Register produces valid knowledge – and thus may be demanded of anyone falling within the scope of application of the document at issue – only after duplicate originals or certified copies of the document have been filed with the Office of the Federal Register (OFR) and a copy is made available for public inspection. That being clarified, section 1507 establishes a series of "rebuttable presumption[s]," i.e., presumptions that are only relative (*iuris tantum*, in Latin) and not absolute, and thus apply unless it is

[903] The Administrative Committee of the Federal Register is composed of the following members: the Archivist of the United States or Acting Archivist, who serves as Chairman of the Committee; an officer of the Department of Justice designated by the Attorney General; and the Director of the U.S. Government Publishing Office, or an acting officer.
[904] 44 U.S.C. § 1506(1).
[905] Section 1506(3).
[906] Section 1505(a)(1).
[907] Section 1505(b).

proved otherwise. Those presumptions constitute an automatic effect of publication in the Federal Register[908].

2. The Code of Federal Regulations

Agency final regulations and rules, i.e., such regulations and rules as become effective, are also published in the Code of Federal Regulations (CFR). Unlike the Federal Register, the Code of Federal Regulations does not encompass proposed rules, notices, or general policy statements. The Code of Federal Regulations is divided into 50 titles, and thus its structure is modeled upon that of the U.S. Code[909]. As the case with the U.S. Code, each title of the Code of Federal Regulation is concerned with a different subject matter[910]. The first edition of the CFR was published in 1938. In the 1960s, the OFR began issuing a new printed version of the CFR – as of 1963 for some titles, and 1967 for the whole CFR – destined for revision once a year[911]. It was soon realized, however, that an annual revision turned out to be extremely burdensome if conducted simultaneously for the entire CFR. Accordingly, in 1972, the OFR divided CFR titles into four groups and has since published separately the revision of such groups of titles in different, pre-fixed quarters of each calendar year[912].

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[908] The presumptions, enumerated in paragraphs (1) through (4), are the following: the document published in the Federal Register "was duly issued, prescribed, or promulgated;" it complies with the conditions on which it may produce valid knowledge; the copy of the document contained in the Federal Register is a faithful, authentic copy of the original; all the provisions established in Chapter 15 ("Federal Register and Code of Federal Regulations") of title 44, U.S. Code, and all regulations issued pursuant to this chapter have been complied with.

[909] The U.S. Code is a collection of such acts of Congress as are formally called "public laws," and are numbered accordingly. The U.S. Code is actually composed of 54 titles.

[910] The correspondence in the order in which subject matters are placed in the U.S. Code and in the Code of Federal Regulations is only partial. In some cases, the name of the subject matter a given title is devoted to is identical. For instance, in either collection of material, title 21 is named "Food and Drugs." In some other cases, the two collections deal with the same matter, but the formal name is slightly different. For instance, the name of title 5 is "Government Organization and Employees" in the U.S. Code, while is "Administrative Personnel" in the Code of Federal Regulations. In other cases, instead, the number and the matter of a given title do not match in the two collections. Title 50 of the U.S. Code, for instance, is devoted to war and national defense, while title 50 of the Code of Federal Regulations deals with wildlife and fisheries.

[911] See MCKINNEY, *A Research Guide to the Federal Register and the Code of Federal Regulations*, McKinney, supra note 898, at 11.

[912] The revision of the different groups of CFR titles is conducted every year – respectively – on the following dates: titles 1-16 on January 1; titles 17-27 on April 1; titles 28-41 on July 1; titles 42-50 on October 1 of each year.

The CFR is provided for in section 1510 of title 44. From joint reading of subsections (a) and (b) it ensures that the CFR is a codification collecting those documents of each federal agency of the executive branch that possess the following features: have general applicability and legal effect; are published in the Federal Register; and are relied upon by agencies in carrying out their activities and functions. The Administrative Committee of the Federal Register is entrusted with the function to issue regulations on the binding of the printed edition of the CFR[913], and on its supplementation, collation, and republication, so as to ensure that the CFR be kept "as current as practicable."[914] The OFR, instead, is competent to materially prepare and publish the CFR, and to take care of its supplements, collations, and indexes[915]. Finally, subsection (e) recognizes to the CFR just a limited capability to constitute an official source of the regulations issued by federal agencies. The subsection, indeed, provides that the documents published in the CFR are only "prima facie evidence of the text of the documents [published in the Federal Register] and of the fact that they are in effect on and after the date of publication."[916]

3. Electronic Editions of the Federal Register and of the CFR and Other Agency Material Available Online

There exist electronic editions of the Federal Register and of the CFR, which are consistent with the tendency of people to consult official documents in electronic format by searching them on the web. Today, indeed, a large number of websites enable interested persons to browse regulations, policy statements, and agency material in general electronically. Most of these websites are directly administered by entities of the Federal Government, and they usually contain – or provide a link to – an electronic version of the Federal Register and of the CFR[917]. The websites hosting specific repositories of federal

[913] 44 U.S.C. § 1510(b).

[914] Section 1510(c).

[915] Section 1510(d).

[916] See RICHARD J. MCKINNEY, *A Research Guide to the Federal Register and the Code of Federal Regulations*, Part of LLSDC's Legislative Sourcebook (updated version, last revised: April 29, 2016) (pointing out that even though section 1510(e) cast some doubts on the trustworthiness of the CFR as a source to draw upon, courts "regularly" accept that agency regulations be referred to according to their publication in the CFR instead of that in the Federal Register).

[917] The OFR and the Government Publishing Office (GPO), for instance, jointly administer *FederalRegister.gov*. This website hosts a HTML edition of the Federal Register, called Federal Register 2.0 or FR2, the purposes of which – the website itself states – are "to make it easier for citizens and communities to understand the regulatory process and to participate in Government

documents and information do not replace individual agencies' websites, but rather they offer people further opportunities for free online access to material pertaining to the executive branch or to the whole Federal Government[918]. In addition to the Federal Government, some (private) universities – namely, law schools – offer on their websites free access to repositories containing a consistent amount of regulations, information, and documents pertaining to the Government[919]. Furthermore, private companies grant their users, who have to subscribe a contract and pay a fee, the ability to browse almost boundless information on the Federal Government by deploying updated databases managed directly by such companies[920].

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decision-making." https://www.federalregister.gov/policy/about-us. The website also provides the user with a series of navigation aids, as well as with links to external resources, such as *Regulations.gov* and *e-CFR*. The former originates from the eRulemaking Program, created in 2002, and is managed by the eRulemaking Program Management Office, which is based within the Environmental Protection Agency (EPA), but benefits from cooperation with various federal agencies. It is a document repository that allows interested persons to give their contribution to federal rulemaking in the course of its formation by posting comments directly on the website, whose subheading indeed reads as follows: "Your Voice in Federal Decision-Making." https://www.regulations.gov/#!home. See MCKINNEY, *A Research Guide to the Federal Register and the Code of Federal Regulations*, ibid. (noting that *Regulations.gov* "encourage[s] electronic comments on proposed regulations from ordinary citizens by presenting a simple way to search, link, and submit and view comments to agency proposed regulations that are still open for comment.") The *e-CFR*, instead, is an electronic version of the Code of Federal Regulations. As with the case of *Federal Register 2.0*, the *e-CFR* is maintained by the OFR and the GPO, which are committed to updating its content on a daily basis.

[918] *Fdsys.gov* (Federal Digital System), for instance, is a website administered by the GPO that contains material concerning all three branches of the Federal Government. Firstly, it enables interested persons to gain access not only to an online version of the Congressional Record, but also to a vast range of further legislative branch material, from bills introduced in either house of Congress to congressional committee reports and hearing transcripts. An electronic version of the U.S. Code and of the federal Constitution is also provided. Secondly, *Fdsys.gov* ensures access to executive branch information, rules, and other documents by making available an updated electronic edition of the Federal Register and of the CFR, even though presidential documents are also collected separately. Thirdly, it is possible to search on the website federal courts' opinions, which are divided into categories based on degree of jurisdiction – district courts and courts of appeals for the different circuits – or on subject matter, and this is the case with the bankruptcy courts.

[919] The Legal Information Institute at Cornell University – Law School, for instance, offers on his website a reliable, constantly updated electronic version of the U.S. Code, an updated collection of Supreme Court decisions, accompanied by an archive of decisions beginning from 1990, as well as an electronic edition of the CFR and other material.

[920] An example thereof is given by the databases of Westlaw and LexisNexis, probably the two most important online legal research services for lawyers and legal professionals in the United States.

E. Publication of Information in the Federal Register

The FOIA requires agencies to publish automatically in the Federal Register certain information "for the guidance of the public." Section 552(a)(1) of title 5, U.S. Code, in particular, identifies five categories of information and documents to be published in the Federal Register. The Government Accountability Office (GAO – formerly, General Accounting Office) has noted that section 552(a)(1) establishes what "has come to be known as the FOIA publication requirement."[921] The first category is concerned with information that not only describes central and field organization of a given agency, but also identifies employees to reach out to and methods to follow for the public to get information from or make requests to such an agency. Secondly, agencies have to publish statements aimed at explaining how they perform their functions and at setting forth the nature and requirements of all proceedings they carry out. Thirdly, agencies are required to publish in the Federal Register not only rules of procedure and information describing forms available at such agencies, but also instructions on the scope and content of administrative papers. The fourth category embraces "substantive rules of general applicability" adopted in execution of statutory provisions, and "statements of general policy or interpretations of general applicability" adopted by an agency[922]. Finally, agencies have to publish in the Federal Register any amendment, revision, or repeal of the rules and of the other information mentioned in the previous categories of subsection (a), paragraph (1).

F. Proactive Disclosures: Publication of Agency Records and Information on Official Websites

Section 552(a)(2) is concerned with publication on official websites, and requires that agencies engage in proactive disclosures by routinely releasing records and information, and by making them available "for public inspection and copying." According to the GAO, section 552(a)(2) establishes what "has come to be known as the FOIA reading room requirement."[923] The phrase "proactive disclosures" implies the obligation for agencies to

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[921] U.S. GENERAL ACCOUNTING OFFICE, *Information Management. Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments* (August 2002), p. 4.

[922] 5 U.S.C. § 552(a)(1)(D).

[923] GENERAL ACCOUNTING OFFICE, *Information Management. Update on Implementation*, supra note 921, ibid.

disseminate records and information without waiting for specific requests to be received. Such an activity is also referred to as "affirmative agency disclosure."[924] The adjectives "proactive" and "affirmative" emphasize the very fact that an agency has to disclose records and information by publishing them on their official websites in advance and regardless of the filing of any demand for information. To put it differently, in publishing records, information, and documents included among the categories subject to proactive disclosure, agencies need not be solicited by FOIA requests coming from the public. Paragraph (1) of subsection (a) also excludes any connection between divulgation of information and the filing of requests, and therefore the five categories of rules and information enumerated in paragraph (1) appear to fall within the scope of proactive disclosures. However, technically, they are not considered equivalent to the categories of records and information established in paragraph (2) by the Official Guide to the FOIA provided by the Department of Justice, which refers only to the latter the phrase "proactive disclosures."[925] A reason for this difference in classification the Department of Justice makes might lie in the fact that automatic publication in the Federal Register is an operation that is not tantamount to making information available to fulfill the obligation established in paragraph (2). The distinction between the publication of information pursuant to paragraph (1) and that required by paragraph (2), however, could only make sense in the past, prior to the Internet era, when information and documents to be proactively disclosed lay in physical structures belonging to agencies. At the time, it would be questionable at least to claim that such information and documents could be fully equated to those published in the Federal Register. The difference in the physical location between paragraph (1) and paragraph (2) information was evident. Another difference may probably be pinpointed in the fact that paragraph (1) requires the publication of rules, statements, and information aimed at providing an overall picture of the regulatory and organizational framework that governs the functioning of agencies. Therefore, paragraph (1) information may be considered to have a more general scope than the categories of information enumerated in paragraph (2). However, by and large, any possible distinction has been overcome by the usage of the Internet to disseminate information. Since today both the Federal Register and the information agencies have to publish proactively are made available online to anyone, the distinction between paragraph

[924] Ibid.

[925] See DEP'T OF JUSTICE, *Official Guide to the Freedom of Information Act, Proactive Disclosures* (posted: August 10, 2009), available at https://www.justice.gov/oip/foia_guide09/proactive-disclosures-2009.pdf.

(1) and paragraph (2) information does not make sense anymore, and ends up being just a historical legacy.

Subsection (a)(2) identifies five categories of records that agencies are required to proactively make available to people. Firstly, each agency has to publish its final opinions, including – the provision specifies – "concurring and dissenting opinions," and orders, respectively rendered and issued in the adjudication of cases[926]. Secondly, an obligation of proactive disclosure is concerned with policy statements and interpretations that have been adopted by each agency but not published in the Federal Register. This subparagraph corroborates my assertion that paragraph (1) information and the one mentioned in paragraph (2) are closely related. Accordingly, it may be time to merge the two paragraphs into one. Thirdly, each agency has to disclose proactively manuals for and instructions to its administrative staff insofar as they "affect a member of the public."[927] Fourthly, each agency is also required to make available records that meet the two following conditions: they have already been released pursuant to subsection (a)(3), and thus in response to a FOIA request; and the agency that released them determines that because of the nature of the subject matter of such records, they "have become or are likely to become the subject of subsequent requests for substantially the same records."[928] Fifthly, each agency is supposed to provide a general index of the records subparagraph (D) refers to, and thus an index devoted to records the access to which has been demanded again or may be demanded again after their disclosure.

Not all categories of information and documents that agencies have to make available not to respond to access requests but on their own initiative were originally provided for in the FOIA. The first three categories were already contained in the version of the FOIA that became effective in 1967. A 1966 report prepared by the House of Representatives characterized the agency material falling within these categories as "the end product of Federal admnistration," which possesses "the force and effect of law in most cases." [929] Such material, therefore, had "precedential significance" for the agency in the carrying out of its activities[930], and nevertheless, access to it by the public was not guaranteed under section 3

[926] Section 552(a)(2)(A).
[927] Section 552(a)(2)(C).
[928] Section 552(a)(2)(D).
[929] H.R. Rep. No. 1497, 89th Cong., 2nd Sess., Committee on Government Operations (May 9, 1966), reprinted in *1966 Source Book*, at 28.
[930] Id., at 29.

APA[931]. In a famous 1975 decision – *NLRB v. Sears, Roebuck & Co.*[932] – the Supreme Court argued that section 552(a)(2) "represents a strong congressional aversion to 'secret [agency] law'," [933] and thus was conceived of by Congress as a means to cope with the traditional tendency of the executive branch to withholding information and with the possibility that agency employees be instructed to make secrecy prevail over disclosure[934].

Section 4(4) of the Electronic Freedom of Information Act of 1996, instead, added the fourth and fifth category of the information subject to proactive disclosure by inserting subparagraphs (D) and (E) into paragraph (2). The former, in particular, which turns out to be the most prominent amendment made over time to the system of proactive disclosures at statutory level, requires that agencies make available their "frequently requested records."[935] The underlying idea of the category established by subparagraph (D) is that publishing on official websites of federal agencies or making available otherwise records agencies have already disclosed in response to FOIA requests may improve efficiency in the search for agency information by the public[936]. Therefore, this subparagraph establishes a relation between records an agency is required to disseminate and the subject of FOIA requests such an agency has received or expects to receive. If the sought information has already been released by a given agency in response to FOIA requests, that agency has to make the information available to the general public, so that anyone can benefit access to such information, previously disclosed only to individual requesters. By the same token,

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[931] Id., at 28 (pointing out that under section 3 APA, the categories of information and documents provided for in section 552(a)(2)(A)-(C) – especially, opinions and orders, whereby federal agencies decide on individual cases – "have been kept secret from the members of the public affected by the decisions.")

[932] 421 U.S. 132 (1975).

[933] Id., at 153 (quoting KENNETH C. DAVIS, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967)).

[934] Davis has observed that if such a case were to occur and thus if information and rules – namely, agency opinions and interpretations – were to be systematically excluded from access by interested persons, "the effect of non-disclosure [would] be to protect an outrageous system of secret law." DAVIS, *The Information Act*, ibid.

[935] DEP'T OF JUSTICE, *FOIA Post*, *Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements* (June 27, 2008), available at https://www.justice.gov/oip/blog/foia-post-2008-guidance-submitting-certification-agency-compliance-foias-reading-room (retrieved: May 8, 2016).

[936] DEP'T OF JUSTICE, *FOIA Post*, *FOIA Counselor Q&A: 'Frequently Requested' Records* (July 25, 2003) (maintaining that making available to anyone records that have already been demanded and released "could be a basis for resolving [FOIA] requests most efficiently.")

subparagraph (D) requires disclosure and online publication of records that have already been released and according to an assessment by the agency, it is likely that they will be frequently requested in the future[937]. Historically, agencies fulfilled the proactive disclosure obligations by making their records available in "conventional reading rooms,"[938] i.e., places specifically aimed at containing collections of agency records in the traditional paper form. Before the advent of the Internet, citizens could only rely upon such rooms to consult records subject to proactive disclosure. The Electronic Freedom of Information Act of 1996 required that agencies make available to the public "by computer telecommunications" subsection (a)(2) records created on or after November 1, 1996[939]. Therefore, November 1, 1996, was the "cut-off date:" agencies had to make available online to anyone records formed as of this date by inserting them into "electronic reading rooms."[940] Congress considered the online availability of records as a more efficient means for agencies to engage in proactive disclosures, and fixed at November 1, 1997, the date by which agencies had to create electronic reading rooms on their official websites[941]. Agencies, however, maintained their conventional reading rooms, as well[942]. Furthermore, subsection (a)(2) prescribes that agencies provide two types of indexes concerning records, information, and documents to be disclosed proactively. Firstly, agencies have to hold and make available to anyone "current indexes identifying information for the public" as to any material produced by agencies since the entry into force of the FOIA and subject to proactive disclosure. Secondly, agencies are required to provide in electronic form the index mentioned in subparagraph (E), i.e., the index of the frequently requested records that constitute the subject of subparagraph (D).

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[937] See DEP'T OF JUSTICE, *FOIA Update: Congress Enacts FOIA Amendments*, Vol. XVII, No. 4 (Fall 1996), available at https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments; ID., *FOIA Update: OIP Guidance: Amendment Implementation Questions*, Vol. XVIII, No. 1 (Winter 1997), available at https://www.justice.gov/oip/blog/oip-guidance-amendment-implementation-questions.

[938] *FOIA Update: Congress Enacts FOIA Amendments*, ibid.

[939] Section 4(7), Electronic Freedom of Information Act of 1996 (codified at 5 U.S.C. § 552(a)(2), last part).

[940] *FOIA Update: Congress Enacts FOIA Amendments*, ibid.

[941] Ibid. ("The amendments [brought in by the Electronic Freedom of Information Act of 1996] embody a strong statutory preference that this new electronic availability be provided by agencies in the form of on-line access, which can be most efficient for both agencies and the public alike, and they allow until November 1, 1997 for it to be provided.")

[942] Ibid. (observing that as of 1997, "agencies will begin to maintain both conventional reading rooms and 'electronic reading rooms' in order to meet their FOIA subsection (a)(2) responsibilities.")

G. Access to Agency Records and Information upon Request

Subsection (a)(3) provides that agencies have to ensure "any person"[943] prompt access to requested records whenever the two following conditions are met: a FOIA request complies with all relevant rules[944]; and it "reasonably describes" the records[945]. Under the definition given by the Administrative Procedure Act, now codified at section 551(2) of title 5, U.S. Code, the term "person" includes any individual, partnership, corporation, association, or public or private organization that is not an agency[946]. In a famous passage from a 1978 decision, the Supreme Court contended that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[947] This passage is important for the reference it makes to transparency as a weapon to prevent and fight corruption, but is also interesting for the usage of the phrase "informed citizenry." How should the term "citizenry" be meant: narrowly or broadly? The former option implies that only American citizens are entitled to gain access to departments and agencies' records pursuant to the FOIA. The latter, however, is to prefer, and as a result, foreign nationals, too, have a right to demand the release of executive branch information. In 1977, the Fifth Circuit provided elucidation on whom is entitled to file a FOIA request. Nothing in the definition of "person" established by Section 551(2) – the Circuit maintained – "suggests [Congress's] intention to limit its plain terms to *American* individuals,"[948] and therefore such a definition allows recognizing the right of access to departments' and agencies' records to aliens. Similarly, the District Court for the District of Columbia observed in 1988 that had Congress intended to restrict the right to know to citizens, it would have expressly used the term "citizen" in the FOIA[949].

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[943] 5 U.S.C. § 552(a)(3)(A)(ii).

[944] Ibid.

[945] Section 552(a)(3)(A)(i).

[946] For the definition of agency, see infra.

[947] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

[948] *Stone v. Export-Import Bank of United States*, 552 F.2d 132, 136 (5th Cir. 1977).

[949] See *O'Rourke v. United States Dep't of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988) (arguing that Congress "distinguishes between a 'citizen' and 'any person' when it wishes to do so.")

Under subsection (a)(6)(A)(i), an agency is supposed to respond to a FOIA request within twenty working days[950]. Such a period commences "on the date on which the request is first received by the appropriate component of the agency […]."[951] The extension of the twenty-day period, which is an exception to the general rule, may bring about the opening of an additional phase within FOIA proceedings. An agency is allowed to draw out the time limit by which a FOIA request must be complied with if "unusual circumstances," as defined in subsection (a)(6)(B)(iii), come about[952]. In such a case, the agency has to inform in writing the person who has filed a FOIA request both of the specific reasons justifying the extension of the time limit by which a response is due and of the date "on which a determination [on the matter] is expected to be dispatched."[953] The ordinary extension period is up to ten working days. If the agency determines that processing a given request will take longer, instead, the concerned person is permitted either to restrict the FOIA request or to reach an arrangement with the agency whereby it is stipulated "an alternative time frame for processing the request or a modified request."[954]

In addition to setting out the reasons for the determination it has made, the agency is to notify the requester of his or her right "to appeal to the head of the agency any adverse determination."[955] An agency, indeed, is also required to decide on any appeal, presented to challenge the first determination on a FOIA request, within the same time frame – twenty working days, which are counted as of the receipt of the appeal[956]. If on appeal the agency upholds the denial of access in whole or in part, it has to acquaint the requester with the purview of the provisions of subsection (a)(4) addressing judicial review of the agency determination on the FOIA request[957]. In particular, subsection (a)(4)(B) confers jurisdiction

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[950] The original version of the FOIA required that agencies comply with FOIA requests within ten working days, but this term turned out to be too short to be observed. Accordingly, section 8(b) of the Electronic Freedom of Information Act of 1996 extended to twenty days the time limit for agencies to process and respond to FOIA requests, which was thus doubled. It has been noted, however, that in practice, departments and agencies frequently do not even respect the twenty-day period. See THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *Federal Open Government Guide*, 4 (10th ed., Washington, D.C., 2009).

[951] 5 U.S.C. § 552(a)(6)(A).

[952] Section 552(a)(6)(B)(i).

[953] Ibid.

[954] Section 552(a)(6)(B)(ii).

[955] Section 552(a)(6)(A)(i).

[956] Section 552(a)(6)(A)(ii).

[957] See, namely, 5 U.S.C. § 552(a)(4)(B)-(G).

over FOIA litigation upon district courts of the United States, which have the power "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." The district court engage in *de novo* review of the matter, and may examine *in camera* the agency records under litigation to assess the legitimacy of withheld material, with respect to which the burden of proof is on the agency. The complainant, however, may not turn to the competent district court until all administrative remedies are exhausted[958]. By quoting *Hidalgo v. FBI*[959], indeed, the Court of Appeals for the District of Columbia has observed in *Wilbur v. CIA*[960] that even though the "exhaustion of [administrative remedies towards] a FOIA request 'is not jurisdictional because the FOIA does not unequivocally make it so,' the FOIA administrative scheme 'favors treating failure to exhaust as a bar to judicial review' […]."[961]

H. The Scope of the FOIA

The FOIA applies only to the executive branch of government, and thus to federal departments and agencies. Section 552(f)(1), added by the 1974 FOIA Amendments Act[962], defines the term "agency" by referring to section 551, which establishes definitions destined to apply to the administrative procedure[963]. Indeed, the definition of agency given by section 551(1) is substantially identical to that originally contained in the Administrative Procedure

[958] See, e.g., *Trueblood v. U.S. Dep't of Treasury*, 943 F. Supp. 64, 68 (D.D.C. 1996) ("A plaintiff's FOIA suit is subject to dismissal for lack of subject matter jurisdiction if he fails to exhaust all administrative remedies."); *ExxonMobil Corp. v. Dep't of Commerce*, 828 F. Supp. 2d 97, 104 (D.D.C. 2001) (pointing out that "a requester under FOIA must file an administrative appeal within the time limit specified in an agency's FOIA regulations or face dismissal of any lawsuit complaining about the agency's response [to his or her FOIA request]."); *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994) ("The FOIA clearly requires a party to exhaust all administrative remedies before seeking redress in the federal courts."); *Voince v. U.S. Dep't of the Air Force*, 983 F.2d 667, 669 (5th Cir. 1993) (concluding that "the FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review.")

[959] 344 F.3d 1256 (D.C. Cir. 2003).

[960] 355 F.3d 675 (D.C. Cir. 2004).

[961] Id., at 677 (quoting *Hidalgo*, 344 F.3d, at 1258, 1259).

[962] Section 3 of the 1974 FOIA Amendments Act inserted at end of the FOIA subsections (d) and (e), of which the latter is the current subsection (f).

[963] Section 551, indeed, begins by clarifying that the definitions of this section apply to the whole subchapter II ("Administrative Procedure") of chapter 5, title 5, U.S. Code. This subchapter includes not only the FOIA, but also the Privacy Act (Section 552a), the open meeting legislation (Section 552b), and the regulation of rulemaking and adjudications (respectively, sections 553 and 554).

Act of 1946[964]. Under section 551(1), the term "agency" identifies each authority of the U.S. Government, which may also be based within the structure of or subject to review by another agency, but does not include the legislative and judicial branches of government – thus, Congress and the system of federal courts – as well as some other authorities. Section 552(f)(1) specifies and extends such a definition by providing that agencies under the FOIA are executive and military departments, corporations that belong to or are controlled by the Government, any other entity within the federal executive branch – including the Executive Office of the President – and independent regulatory agencies. The definition of "agency" under section 552(f)(1) is – or, at least, appears to be – broader than that resulting from the APA, whose scope was identified in too a generic fashion. As the Court of Appeals for the District of Columbia observed in 1997 by quoting a 1990 decision of the same Court, "the additional language of section 552(f)" entered the FOIA by the 1974 FOIA Amendments Act "'to encompass entities that might have eluded the APA's definition [of agency] in § 551(1).'"[965] As for the application of the FOIA to the Executive Office of the President, a House of Representatives report has determined that "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" are excluded from the definition of agency, and thus are not subject to the FOIA[966]. An entity that is not part of the executive branch apparatus and thus is not encompassed in the definition of agency pursuant to the FOIA, however, may well adopt a policy on transparency of its own information and documents that is modeled upon FOIA provisions. It has been noted, for instance, that the Smithsonian Institution, which despite receiving

[964] See *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581, 583 (D.C. Cir. 1990) (arguing that the FOIA "ha[s] incorporated by reference" the definition of agency provided for in the APA and codified in section 551(1)).

[965] *Dong v. Smithsonian Institution*, 125 F. 3d 877, 879 (D.C. Cir. 1997) (quoting *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, ibid.).

[966] H.R. Conf. Rep. No. 93-1380, 93rd Cong., 2nd Sess. (September 25, 1974), p. 15, reprinted in *1975 Source Book*, at 232 (quoted in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980)). The language the House of Representatives employs in this regard is taken from a D.C. Circuit decision issued in 1971. See *Soucie v. David*, 448 F. 2d. 1067, 1075 (D.C. Cir. 1971). In such a decision, however, the Court of Appeals for the District of Columbia concluded that the Office of Science and Technology met the requirements for being considered an agency under the FOIA. Id., at 1071-1075.

federal funds, is not an agency under the FOIA, tends to follow a disclosure policy that turns out to be FOIA-oriented[967].

The FOIA does not apply to the legislative and judicial branches of the Federal Government, nor to the agencies and bodies that are part of their structure. In *Mayo v. U.S. Gov't Printing Office*[968], the Ninth Circuit held that since section 551(1) explicitly excludes Congress and the federal courts from the definition of "agency" under the provisions on the administrative procedure, such an exclusion must be meant so as to extend to the whole structure of the legislative and judicial branches. Accordingly, the Ninth Circuit established that the Government Printing Office – now Government Publishing Office – is not subject to the FOIA because it is an agency within the legislative branch[969]. By the same token, in 1993, the Ninth Circuit ruled that the United States Sentencing Commission, an independent agency within the judicial branch, it is not subject to the FOIA, as it does not constitute an "agency" under the act[970]. Even though the FOIA does not apply to entities belonging to the legislative or to the judicial branch, such entities, however, may well manage the release of their own records according to a FOIA-oriented policy. The Government Accountability Office, for instance, is an agency of the Legislative branch like the Government Publishing Office. Section 81.1 of title 4 CFR provides that even though the GAO is not subject to the FOIA, "GAO's disclosure policy follows the spirit of the [FOIA] consistent with its duties and functions and responsibility to the Congress."

I. "Agency Record" Under the FOIA

The purpose of any FOIA request is to obtain the release of agency records whenever records are not made available proactively by the agency that holds them. As the Supreme Court noted in a 1980 decision, *Forsham v. Harris*[971], originally – and for a long time – the

[967] See THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *Federal Open Government Guide*, supra note 949, at 5 (pointing out that "[w]hile asserting its need to protect certain financial and donor data through exemptions that are broader than [those established by the FOIA], the Smithsonian has adopted the presumption of disclosure present in FOIA and many other provisions in the law.")

[968] 9 F.3d 1450 (9th Cir. 1994).

[969] Id., at 1451.

[970] *Andrade v. U.S. Sentencing Commission*, 989 F. 2d 308 (9th Cir. 1993).

[971] 445 U.S. 169 (1980).

FOIA did not contain a definition of "agency records."[972] Accordingly, courts tended to adapt the meaning of "record" set forth in trustworthy dictionaries to that the term assumed pursuant to the FOIA[973]. In *Forsham*, instead, the Supreme Court inferred the meaning of the term from two different statutes – the Records Disposal Act of 1943[974] and the Presidential Records Act of 1978. As to the former, the definition of "records" contained in section 3301 of title 44, U.S. Code[975], which according to the Supreme Court, fixed "[a] threshold requirement for agency records,"[976] is no longer effective[977]. The Presidential and Federal Records Act Amendments of 2014[978] re-wrote section 3301[979]. As noted above, the

[972] Id., at 182-183.

[973] See *Nichols v. United States*, 325 F. Supp. 130, 135 (D. Kan. 1971) (arguing that since none of the three branches of government has provided a clear definition of what a record held by an executive department or agency consists in, "reliance may be placed on a dictionary of respected ancestry for a reasonably accurate meaning of the word.")

[974] Act of July 7, 1943, ch. 192, 57 Stat. 380 – "An Act to Provide for the Disposal of Certain Records of the United States Government," which originally inserted sections 366-380 into title 44, U.S. Code. The act was significantly amended by Pub. L. 90-620, 82 Stat. 1254 (October 22, 1968), whose chapter 33 ("Disposal of Records") inserted sections 3301-3314 into the title of the U.S. Code previously mentioned. Id., at 1299.

[975] See previous note.

[976] *Forsham*, 445 U.S., supra note 971, at 183.

[977] Section 3301, inserted by Pub. Law 90-620 of 1968, defined records as "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." The definition explicitly excluded from records as meant in this section "[l]ibrary and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents […]."

[978] Pub. L. 113-187, 128 Stat. 2003 (November 26, 2014).

[979] Section 5(a), Presidential and Federal Records Act Amendments of 2014. Currently, section 3301(a)(1)(A) provides that as far as the chapter devoted to the disposal of records is concerned, the term "record" includes "all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them […]." According to subparagraph (B), which takes up most of the wording of the former version of section 3301 as to the borders of the scope of the definition of "record," this definition does not extend to two categories of material: "(i) library and museum material made or acquired and preserved solely

Supreme Court also referred to the definition of "presidential records," established by the Presidential Records Act of 1978 and codified at section 2201 of title 44, U.S. Code. The Presidential and Federal Records Act Amendments of 2014 brought some minor amendments to this section[980]. However, section 2201(2)(B)(i) explicitly excludes agency records from the scope of the definition of "presidential records."

Section 3 of the Electronic Freedom of Information Act of 1996 established a specific definition of "record," which was expressly destined to extend to any other term used to identify information, broadly meant, for purposes of the FOIA. Therefore, by pursuing the clear purpose to prevent the risk that the definition was subject to a narrow interpretation, Congress provided that agency records consisted in "any information that would be an agency record subject to the requirements of [section 552, title 5, U.S. Code] when maintained by an agency in any format, including an electronic format." Such a definition is still effective[981], but the OPEN Government Act of 2007 extended it to any information that possesses all the features described by the definition itself and "is maintained for an agency by an entity under Government contract, for the purposes of records management."[982] However, judicial interpretation as to what constitutes an agency record long preceded this evolution at statutory level. After the *Forsham* decision mentioned above, a fundamental step ahead is represented by *Dep't of Justice v. Tax Analysts*[983], wherein the Supreme Court pinpoints two vital components to the existence of an agency record. Previous reconstruction of the meaning of "record" under the FOIA by the Supreme Court underpinned such a step ahead. The Court, indeed, states that the two necessary elements for identification of agency records can be inferred from *Kissinger*[984] and *Forsham*[985]. Firstly, by quoting *Forsham*, the

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for reference or exhibition purposes; [and] (ii) duplicate copies of records preserved only for convenience."

[980] Section 2201(2) defines "presidential records" as "documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."

[981] 5 U.S.C. § 552(f)(2)(A).

[982] Section 552(f)(2)(B).

[983] 492 U.S. 136 (1989).

[984] 445 U.S. 136, supra note 966.

[985] In *Tax Analysts*, the Supreme Court recalls the conclusion it reached in its two previous decisions as far as agency records are concerned. The Court notes that Kissinger dealt with various FOIA requests aimed at obtaining summaries of telephone conversations in which Henry Kissinger had participated, but only one of such requests required to identify what constituted agency records. See

Supreme Court holds that a prerequisite to the existence of an "agency record" under the FOIA is that a federal department or an agency must "either create or obtain" the requested material[986]. In *Forsham*, indeed, the Court, by referring to the definitions of "records" and "presidential records" provided for – respectively – in sections 3301 and 2201 of title 44, U.S. Code, argued that "it is not insignificant that Congress has associated creation or acquisition with the concept of a governmental record."[987] Secondly, the Supreme Court requires that the agency be "in control of the [sought information] at the time the FOIA

Tax Analysts, 492 U.S., at 143. The subject of the request were summaries of conversations Kissinger had while he was serving as Assistant of the President for National Security Affairs. These conversations could not be considered as National Security Council records, as they involved Kissinger "in his capacity as a Presidential adviser only." *Kissinger*, 445 U.S., at 156. He was a member of the Office of the President, which, unlike the National Security Council, is not an agency under the FOIA. Ibid. Therefore, the summaries of such conversations did not fall within the definition of "agency records" at the time of their formation. Even though Kissinger later (1973 through 1977) served as Secretary of State, and the Department of State is subject to the FOIA, the conversations at issue did not acquire the status of "agency records" under the FOIA "when they were removed from White House files and physically taken to Kissinger's office at the Department of State." Id., at 157. It would be wrong – the Supreme Court argued – "to hold that the physical location of the notes of telephone conversations renders them 'agency records.'" Those notes "were not in the control of the State Department at any time. They were not generated in the State Department." The Court observed that "[i]f mere physical location of papers and materials could confer status as an 'agency record,' Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA." Ibid. Furthermore, in *Tax Analysts*, the Supreme Court refers to *Forsham*. *Tax Analysts*, id., at 144. In *Forsham*, the FOIA request under consideration before the Supreme Court was concerned with raw data on which a study conducted by a private medical research organization was based. Even though it was funded through federal resources, the study was held all the time by the private organization. The fact that the funding of the study was to ascribe to the executive branch of the Federal Government – the Court pointed out – was not a sufficient element to render such raw material as "agency records" pursuant to the FOIA. Indeed, both the definition of "agency" and Congress's policy towards records held by federal grantees indicate that "Congress did not intend that grant supervision short of Government control serve as a sufficient basis to make the private records 'agency records' under the Act, and reveal a congressional determination to keep federal grantees free from the direct obligations imposed by the FOIA." *Forsham*, 445 U.S., at 182. The FOIA – the Supreme Court contended later on – "deals with 'agency records,' not information in the abstract." Accordingly, the FOIA "applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained. To construe the FOIA to embrace the latter class of documents would be to extend the reach of the Act beyond [congressional intent]." Id., at 186 (italics in original).

[986] *Tax Analysts*, 492 U.S., supra note 983, at 144.

[987] *Forsham*, 445 U.S., supra note 971, at 184.

request is made."[988] Especially the D.C. Circuit has given substance to the concept of agency control over records under the FOIA[989].

J. The Charging of Fees

According to a general rule subject to some limitations, federal agencies charge any person with a fee for processing their FOIA request. Most of the provisions brought in by the FOIA Amendments Act of 1986, which established the framework regulation of this matter, are still effective. By implementing some of these provisions, the Office of Management and Budget issued the Uniform Freedom of Information Act Fee Schedule and Guidelines in March 1987[990] [hereinafter – OMB Fee Guidelines]. Agencies were assigned a deadline, by which they had to promulgate regulations aimed at implementing the OMB Fee Guidelines. Some amendments to the FOIA, however, were added in the first decade of the twenty-first century. As already noted, in particular, the OPEN Government Act of 2007 inserted in the FOIA the definition of "representative of the news media," which is relevant to the charging of fees. The FOIA identifies three different categories of requests, and lays down principles agency regulations have to comply with in determining the amount of fees, which differs for the three categories. The first category is concerned with the commercial use of the material identified in a FOIA request. When records are requested for commercial use, fees must consist of "reasonable standard charges for document search, duplication, and review […]."[991] The OMB Fee Guidelines define "commercial use" as "a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made."[992] It is the use of the sought information that counts to determine whether a FOIA request falls within this category, not the identity of the

[988] *Tax Analysts*, 492 U.S., supra note 983, at 145.

[989] See *Burka v. U.S. Dep't of Health and Human Services*, 87 F.3d 508, 515 (D.C. Cir. 1996) (noting that this very Court of Appeals Circuit "has identified four factors relevant to a determination of whether an agency exercises sufficient control over a document to render it an 'agency record.'") Those factors are the following: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." Ibid. (quoting *Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988)).

[990] 52 Fed. Reg. 10012 (March 27, 1987).

[991] 5 U.S.C. § 552(a)(4)(A)(ii)(I).

[992] OMB Fee Guidelines, at 10017-10018.

requester[993]. Accordingly, a commercial enterprise – the OMB Fee Guidelines observe – may well file under the FOIA a request that does not meet the "commercial use" criterion, while it is possible that a request from a non-profit organization does[994]. The agency processing a given FOIA request should seek to obtain some elucidation when it is not immediately apparent whether the requested information will be subject to commercial usage[995]. The second category refers to a FOIA request filed "by an educational or noncommercial scientific institution," provided that the purpose of obtaining the release of the sought material consists in "[pure] scholarly or scientific research," or filed by a representative of the news media. Such a FOIA request calls for a fee that just equates to the cost of document duplication[996]. The OMB Fee Guidelines include a wide range of types of schools in the term "educational institution,"[997] but clarify that a FOIA request does not fit into this category if "it serves [not] a scholarly research goal of the institution," but rather an individual goal, even if the requester is a professor[998]. In defining "representative of the news media," instead, the OPEN Government Act of 2007 takes up what the OMB Fee Guidelines already provided for, with respect – for instance – to the term "news."[999] As the Court of Appeals for the District of Columbia pointed out in a 1989 decision, National Security Archive v. Dep't of Defense,[1000] a request from a representative of the news media is not considered as such for purposes of the charging of fees when it is filed in performing a function that proves different from the function of disseminating news[1001]. The third category of requests, finally, may be considered the residual category, as it encompasses requests that do not belong either to the first or to the second category, and requires the payment of both search and duplications fees[1002].

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[993] Id., at 10013.

[994] Ibid.

[995] Id., at 10018.

[996] 5 U.S.C. § 552(a)(4)(A)(ii)(II).

[997] OMB Fee Guidelines, at 10018.

[998] Id., at 10014.

[999] 5 U.S.C. § 552(a)(4)(A)(ii) (identifying the term "news" as "information that is about current events or that would be of current interest to the public.")

[1000] 880 F.2d 1381 (D.C. Cir. 1989).

[1001] Id., at 1387 (holding that an entity that carries out "news media activities" on a regular basis may not be considered a representative of the news media and benefit its treatment as to application of fees "when it requests documents […] in aid of its nonjournalistic activities.")

[1002] 5 U.S.C. § 552(a)(4)(A)(ii)(III).

Agencies may not charge a fee or have to reduce it if disclosure of the requested information "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[1003] In 1987, the Department of Justice issued fee waiver policy guidance[1004], which directed agencies to take into account several factors in determining when fees should not be charged. Firstly, the guidance requires the existence of a public interest in disclosure. In this regard, the public interest implies that the release of the requested information be capable of facilitating people's understanding of operations or activities carried out by the Federal Executive. By referring to the need for comprehensibility of executive branch business, the guidance appears to allude to the concept of transparency, which indeed the public interest in disclosure is intended to realize. Secondly, even if the requester has a commercial interest that adds to the public interest in the sought information, the latter must prevail. The factors federal agencies have to consider are also found in section 16.11(k) of title 28, CFR. The application of a fee waiver, therefore, is subject to "a two-pronged test the requester must satisfy."[1005] The requester bears the burden to demonstrate that the statutory and regulatory standards for a fee waiver are met[1006].

K. The FOIA Exemptions

1. The Need to Strike a Balance Between the People's Right to Know and Agencies' Interest in Keeping Certain Information Secret

Disclosure of agency records cannot occur across the board, and indeed the FOIA provides for specific exemptions to freedom of information. House of Representatives Report No. 1497 of 1966, which accompanied S. 1160, i.e., the original version of the FOIA, observed that by enacting the FOIA, Congress intended "to reach a workable balance between the right of the public to know and the need of the Government to keep information

[1003] Section 552(a)(4)(A)(iii).

[1004] *FOIA Update, Vol. VIII, No. 1* (Winter/Spring 1987), pp. 3-10.

[1005] *FedCURE v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009). See also *Institute* for *Wildlife Protection v. United States Fish* and *Wildlife Service*, 290 F. Supp. 2d 1226, 1228 (D. Or. 2003); *Sloman v. Dep't of Justice*, 832 F. Supp. 63, 68 (S.D.N.Y. 1993); *Perkins v. Dep't of Veterans Affairs*, 754 F. Supp. 2d 1, 5 (D.D.C. 2010).

[1006] See. e.g., *Reynolds v. Attorney Gen. of the U.S.*, 391 F. App'x 45, 46 (2nd Cir. 2010); *Perkins*, ibid.; *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 97 (D.D.C. 2008).

in confidence to the extent necessary without permitting indiscriminate secrecy."[1007] In a 1982 decision, *FBI v. Abramson*[1008], the Supreme Court pointed out that Congress was well aware that "legitimate governmental and private interests could be harmed by release of certain types of information," and accordingly, inserted into the FOIA "specific exemptions under which disclosure could be refused."[1009] As maintained in *John Doe Agency v. John Doe Corp.*[1010], "[the FOIA's] broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the 'balance' Congress has struck."[1011] The FOIA exemptions, therefore, embody an inevitable compromise between people's right to know and agencies' interest in denying access to some of the information they hold. In *Am. Civil Liberties Union v. Dep't of Justice*[1012], the United States District Court for the District of Columbia highlighted the balance the FOIA calls for "between the right of the public to know what their government is up to and the often compelling interest that the government maintains in keeping certain information private, whether to protect particular individuals or the national interest as a whole."[1013] The reference to the right of access ensured by the FOIA

[1007] H.R. Rep. No. 89-1497, 89th Cong., 2nd Sess., reprinted in *1966 Source Book*, at 27.
[1008] 456 U.S. 615 (1982).
[1009] Id., at 621. See also, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc); *United Techs. Corp. v. Dep't of Defense*, 601 F.3d 557, 559 (D.C. Cir. 2010).
[1010] 493 U.S. 146 (1989).
[1011] Id., at 153 (referring to *Mink*, 410 U.S., supra note 858, at 80).
[1012] 265 F.Supp. 2d 20 (D.D.C. 2003). In this case, the ACLU files a FOIA request to the Department of Justice to obtain the release of statistical data documenting how – *rectius*, how many times – the Department has exercised its new information gathering powers, powers concerning surveillance activities and the like for purposes of terrorism prevention, since the USA PATRIOT Act provided for those powers. By delivering a memorandum opinion on behalf of the District Court for the District of Columbia, Judge Huvelle rules that the statistical information sought through the FOIA request may be withheld on national security grounds. The Court, therefore, detects a legitimate invocation of Exemption 1 of the FOIA by the Department of Justice. For an analysis of the information gathering powers added by the USA PATRIOT Act, id., at 22-25 (memorandum opinion, Huvelle, J.). Under the U.S. legal system, a memorandum opinion is an opinion featured by conciseness, as the court preparing it determines that the legal principles at issue are well established, and thus do not call for a broad explanation. See *Black's Law Dictionary*, 1201 (9th ed., 2009). In other words, the limited dimension that features memorandum opinions is due to the fact that they lack any really innovative content, and thus provide substantial contribution to none of the legal issue they deal with.
[1013] Id., at 27.

as anyone's right to know "what their Government is up to" has had notable success, as it is frequently quoted in federal court decisions[1014].

2. Disclosure as the "Dominant Objective" of the FOIA

The fact that the FOIA provides for a series of exemptions does not mean that their usage may be abused by federal agencies. As early as 1964, a Senate report accompanying S. 1666[1015], a bill that was aimed at bringing in a FOIA during the 88th Congress (1963-1965), made it clear that "[s]uccess [in the application of a FOIA] lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."[1016] In Mink, the Supreme Court noted that the FOIA represents an "attempt to provide [such a] formula."[1017] However, as the Court stressed in a 1976 decision, *Dep't of the Air Force v. Rose*[1018], "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA]."[1019] The consequence that ensues is clear: The FOIA exemptions "must be narrowly construed."[1020] As the Mink opinion already noted, the exemptions "are explicitly made exclusive" by subsection (c)[1021] – now subsection (d). Not only does this subsection exclude that the FOIA constitutes authority to withhold information from Congress; it also forbids federal agencies from denying access to their records to the public beyond the limits

[1014] See *Dep't of Justice v. Reporters Comm. for Free Press*, 489 U.S. 749, 772-773 (1989) (referring to *Mink*, 410 U.S., supra note 858, at 105 (which in turn quotes HENRY STEELE COMMAGER, *The New York Review of Books* (October 5, 1972), p. 7) (noting that in his dissenting opinion in *Mink*, Justice Douglas described the philosophy the FOIA is based upon by quoting Henry Steele Commager, according to whom the Founding Fathers of the American Republic "thought secrecy in government one of the instruments of Old World tyranny, and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to*." (emphasis added)). See also, e.g., *National Archives And Records Administration V. Favish*, 541 U.S. 157, 171 (2004).

[1015] S. 1666, also known as the "Freedom of Information Bill," had the purpose "to clarify and protect the right of the public to information, [as well as] other purposes." On July 28, 1964, the Senate passed by voice vote the bill, which however never became a public law of Congress.

[1016] S. Rep. No. 88-1219, 88th Congress, 2nd Sess., reprinted in *1966 Source Book*, at 93.

[1017] *Mink*, 410 U.S., at 80.

[1018] 425 U.S. 352 (1976).

[1019] Id., at 361.

[1020] Ibid. Courts frequently repeat such a precept. See, e.g., *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010) (contending that the FOIA exemptions "are construed narrowly in keeping with FOIA's presumption in favor of disclosure.")

[1021] *Mink*, 410 U.S., supra note 858, at 79.

"specifically stated" in the FOIA[1022]. Accordingly, the burden of proving the legitimacy of applying one or more exemptions in response to a FOIA request is imposed upon the agency[1023].

3. The "Reasonably Segregable" Obligation

The principle of the necessary prevalence of disclosure over secrecy entails a further corollary: Agencies are supposed to separate within a given record the portions to keep secret from such portions as may be released. The FOIA expressly provides for such a prescription. It is based on the assumption that even if a record or multiple records contain information, the disclosure of which could jeopardize essential interests, they may also contain information the access to which by the public does not generate the same risk[1024]. In addition to establishing the exemptions to freedom of information, indeed, subsection (b) of the FOIA imposes upon federal agencies what the U.S. Department of Justice's Guide to the Freedom of Information Act calls the "'reasonably segregable' obligation."[1025] In particular, subsection (b) prescribes that each agency release to a person requesting a certain record "[a]ny reasonably segregable portion" of the record after deleting such portions as can be lawfully withheld, because they fall within one or more exemptions[1026].

[1022] 5 U.S.C. § 552(d).

[1023] See *Public Citizen*, 598 F.3d, ibid. (referring to *Loving v. Dep't of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008)) (underlining that the agency processing a FOIA request "bears the burden of showing that a claimed exemption applies."). See also *Am. Civil Liberties Union v. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011) (pointing out that when an agency responds to a FOIA request by withholding records – either in whole or in part – this agency "bears the burden of proving the applicability of claimed exemptions.")

[1024] See *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (contending that "[it has] long been the rule [in the D.C. Circuit] that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions."); *Shiller v. National Labor Relations Board*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) (remanding the case to the district court for further proceedings, for the lower court failed to enforce the obligation imposed upon the Board by the FOIA "to disclose reasonably segregable information.") A district court, indeed – the Court of Appeals for the District of Columbia observes -- commits an error that consists in a violation of law if it "'simply approve[s] the withholding of an entire document without entering a finding on segregability, or the lack thereof.'" Ibid. (quoting *Powell v. United States Bureau of Prisons*, 927 F.2d 1239, 1242 note 4 (D.C. Cir.1991) (which in turn quotes *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 744 (9th Cir. 1979))).

[1025] *Procedural Requirements*, in DEP'T OF JUSTICE, *Guide to the Freedom of Information Act* (2009 ed.) (online version, updated: September 4, 2013) (retrieved: May 11, 2016), p. 55.

[1026] 5 U.S.C. § 552(b)(sentence immediately following the exemptions).

4. The Exemptions Enumerated in the FOIA

Subsection (b) of section 552 enumerates nine exemptions to the mandatory disclosure imposed upon agencies. Exemption 1 permits agencies to withhold from access information on national security and foreign affairs that has been properly classified pursuant to an Executive order issued by the President of the United States. In particular, subsection (b)(1) exempts from disclosure – whether proactive or upon request – information that meets the two following requirements: it is concerned with matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy;" and the information "[is] in fact properly classified pursuant to such Executive order."[1027] Therefore, by enacting the FOIA, Congress recognized the authority of the executive branch to establish the amount of secrecy that is necessary to protect the interests of the United States in the domains of national security and foreign affairs. It is the U.S. President, indeed, who determines the actual scope of this exemption by issuing an executive order governing classification of national security information. Exemption 2 covers information "related solely to the internal personnel rules and practices of an agency."[1028] Under Exemption 3, agencies may deny access to requested information by applying provisions contained in federal statutes other than the FOIA that authorize the withholding of information. Therefore, such nondisclosure provisions end up being incorporated into the FOIA by means of Exemption 3. Their incorporation into the FOIA, however, occurs only if one of the two following requirements, which thus act disjunctively, is met: a nondisclosure provision prescribes the withholding of certain information from the public "in such a manner as to leave no discretion on the issue;" or it "establishes particular criteria for withholding or refers to particular types of matters to be withheld."[1029] Furthermore, as already noted above, the OPEN FOIA Act of 2009 added a requirement that applies to statutes that have become effective since the enactment of the OPEN FOIA Act of 2009. Agencies may call upon such statutes to deny access to records only if the statutes – namely, their nondisclosure provisions – expressly mention Exemption 3 of the FOIA. The National Security Act of 1947[1030], as amended, constitutes an example of a federal statute other than the FOIA that contains nondisclosure provisions. In particular, a provision of this

[1027] Section 552(b)(1)(A),(B).

[1028] Section 552(b)(2).

[1029] Section 552(b)(3)(A)(i),(ii).

[1030] Pub. L. No. 80-235, 61 Stat. 496 (July 26, 1947), currently codified at 50 U.S.C. 3001 et seqq.

act, in its current version as codified at section 3024(i)(i), of title 50, U.S. Code, vests in the Director of National Intelligence the authority "[to] protect intelligence sources and methods from unauthorized disclosure." Exemption 4, instead, shields from indiscriminate access trade secrets and commercial or financial information contained in agency records. Departments and agencies gather such secrets and information in the course of their relations with persons (individuals and businesses), who submit such information either voluntarily or because they are required to, but in any event they rely upon confidentiality. Actually, both parties to the relation – the private and the public one – benefit from confidentiality being kept on commercial or financial information, as well as on trade secrets. Exemption 5 allows agencies to withhold from access "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[1031] Despite textually referring only to the so-called deliberative process privilege, which is aimed at ensuring the candid exchange of opinions and communications within an agency or between agencies in the carrying out of administrative activity, this exemption has a broader scope. Exemption 5, indeed, is traditionally believed to include the presidential communications privilege, and the attorney-client privilege, as well. The latter covers communications and material pertaining to legal assistance furnished to federal agencies[1032]. Exemptions 6 and 7(C), instead, protect the right to privacy. Exemption 6 allows agencies to deny the release of information that is concerned with one or more individuals and contained in personnel and medical files, and similar files, whenever disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."[1033] The same wording is found in Exemption 7(C). Indeed, this exemption (or subexemption), too, provides for the ability to respond to FOIA requests by refusing access whenever the disclosure of the requested information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[1034] Exemption 7 encompasses six subexemptions agencies are allowed to invoke to withhold records and information

[1031] 5 U.S.C. § 552(b)(5).

[1032] See *In re Country of Erie*, 473 F.3d 413, 418 (2nd Cir. 2007). See also *Fox News Network, LLC v. Dep't of the Treasury*, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010) (holding that the privilege exists even if a third party is involved in the relationship between the attorney and the client, because "the common interest doctrine," which requires the confidentiality of the communications exchanged between the parties, applies regardless of the number of parties to this relationship). It is evident, however, that an eccessive number of parties would thwart the rationale of the privilege.

[1033] 5 U.S.C. § 552(b)(6).

[1034] Section 552(b)(7)(C).

"compiled for law enforcement purposes,"[1035] provided that the conditions established for the application of each subexemption are met. Overall, the subexemptions are aimed at protecting the confidentiality of information and records relevant to law enforcement proceedings when the disclosure of such information and records could reasonably result in causing harm to concerned individuals and their privacy or to activities carried out by law enforcement agencies[1036]. Exemption 8 is concerned with such material as bank examination reports and related documents that is of interest to agencies "responsible for the regulation or supervision of financial institutions."[1037] According to courts, such an exemption pursues two purposes, the primary of which is "to ensure the security of financial institutions,"[1038] which could be jeopardized by the disclosure of "candid evaluations of financial institutions […]."[1039] The secondary purpose is "to safeguard the relationship between the banks and their supervising agencies."[1040] This exemption, as interpreted by courts, appears to be inconsistent with the rationale the whole set of the FOIA exemptions is based on, a rationale that entails a narrow interpretation of the exemptions. It has been noted, indeed, that

[1035] Section 552(b)(7).

[1036] The content of the different exemptions (or subexemptions) may be summed up as follows. Exemption (7)(A) covers records the disclosure of which would reasonably be expected to undermine the effectiveness of law enforcement proceedings. The second subexemption allows law enforcement agencies to withhold information, whose release would deprive a person of a right to a fair trial or to an impartial adjudication. As already explained, the third subexemption is aimed at safeguarding the privacy of a person involved in law enforcement activities. Under paragraph 7(D), instead, agencies have authority to shield from public access records, whose release could reasonably result in disclosing "the identity of a confidential source […], and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." Exemption 7(E) allows federal agencies to not make available to FOIA requesters documents setting forth techniques and procedures for law enforcement investigations or prosecutions, as well as guidelines for investigations or prosecutions, when the disclosure of such material could reasonably foster or facilitate "circumvention of the law." Finally, paragraph 7(F) permits agencies to refuse the release of information, whose disclosure "could reasonably be expected to endanger the life or physical safety of any individual."

[1037] 5 U.S.C. § 552(b)(8).

[1038] *Consumers Union of the U.S., Inc. v. Heimann,* 589 F.2d 531, 533 (D.C. Cir. 1978).

[1039] *National Community Reinvestment Coalition v. National Credit Union Administration,* 290 F. Supp. 2d 124, 135-36 (D.D.C. 2003).

[1040] *Consumers Union,* 589 F.2d, at 534.

Congress meant the scope of Exemption 8 to be broad[1041], and thus "has left no room for a narrower interpretation [of this exemption]."[1042] Finally, Exemption 9, the rare invocation of which by agencies is often pointed out to demonstrate its scarce significance within the overall framework of the FOIA exemptions, allows withholding from access both geological and geophysical information and maps of wells.

5. The Exclusions

Other than the exemptions, there exist also some so-called exclusions, which consist in a further instrument to protect from disclosure information held by law enforcement agencies. The Freedom of Information Reform Act of 1986 inserted into the FOIA a new subsection (c)[1043], devoted to the exclusions. Subsection (c) is divided into three paragraphs, each of which corresponds to an exclusion agencies may deploy. The three exclusions have in common the effect that their application produces on agency records: Such records are treated as if they were not subject to the FOIA. To put it differently, an agency appealing to an exclusion is allowed to exclude from the FOIA's scope the records covered by the exclusion. The mechanism for the functioning of the exclusions, therefore, may not be equated to the one governing the application of the exemptions. In particular, since the exclusions allow agencies to bring information that constitutes the subject of FOIA requests out of the FOIA scope, it appears to be clear the difference between the exclusions themselves and the so-called "Glomarization."[1044] The latter term refers to situations in

[1041] Id., at 533 (contending that if Congress "has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not our function [as federal judges], even in the FOIA context, to subvert that effort.")

[1042] *McCullough v. FDIC*, No. 79-1132, 1980 U.S. Dist. LEXIS 17685, at 2 (D.D.C. July 28, 1980).

[1043] Accordingly, subsections (c) through (e) of section 552 were rearranged so as to become subsections (d) through (f).

[1044] The name "Glomarization" stems from a CIA operation conducted in the 1970s to recover a Soviet submarine that had sank in the Pacific Ocean in 1968. The operation, indeed, involved usage of a barge called "Glomar Explorer." After the press discovered the operation, FOIA requests were filed to obtain some details, but the CIA replied that it could not either confirm or deny the existence of the operation. In particular, the cases concerning – respectively – a FOIA request filed by a reporter and another one filed by the Military Audit Project, a nonprofit organization, eventually got to the Court of Appeals for the District of Columbia. See *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976); *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981). In both cases, the D.C. Circuit "formally recognized the logic of the CIA's response, accepting that the existence or nonexistence of the requested records was itself a classified fact protectable by FOIA Exemptions 1 and 3." MICHAEL D. BECKER, *Piercing Glomar: Using the Freedom of Information Act and the Official*

which federal agencies, in the interest of national security or of the effectiveness in law enforcement proceedings, and thus – essentially – in the context of Exemptions 1 and 3 or Exemption 7 cases, refuse either to confirm or to deny the existence of certain records and information that have been requested[1045]. Even though confusion as to the application of the two mechanisms may arise in litigation[1046], the District Court for the District of Columbia correctly observed in 2012 that the procedure by which these mechanisms operate is different because the level of secrecy agencies may depend on is greater in the exclusions than in the event of a Glomar response to a FOIA request. When an exclusion applies, indeed, agencies – as noted above – are allowed to consider the sought records as not covered by the scope of the FOIA. A Glomar response, instead, requires in any event that the agency satisfy its burden of proving that the material sought falls within the scope of a given exemption, even though such an agency is not obliged to take an official stand on the existence of the records[1047]. The memorandum from Attorney General Edwin Meese III on the FOIA amendments brought in in 1986 in the specific interest of law enforcement[1048] conceded that a Glomar response is capable of protecting records from disclosure. Yet, its potential for coverage of records is limited by the fact that a Glomar response always acts in connection with one or more FOIA exemptions. In other words, such a mechanism may be applied only to prevent the release of specific records, after their inclusion into a given FOIA exemption is demonstrated. The memorandum argues that "Glomarization" turns out to be "inadequate to guard against the harm caused by the very invocation of a particular exemption," nor may it prevail over multiple FOIA requests aimed at obtaining the disclosure of a vast range of

Acknowledgement Doctrine to Keep Government Secrecy in Check, 64 Admin. L. Rev. 673, 682 (2012) (referring to JAMES X. DEMPSEY, *The CIA and Secrecy*, in ATHAN G. THEOHARIS (ed.), *A Culture of Secrecy: The Government versus the People's Right to Know*, 46 (Lawrence, Kansas, University Press of Kansas, 1998).

[1045] See *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *Phillippi v. CIA*, id., at 1013 (D.C. Cir. 1976).

[1046] See *Light v. Dep't of Justice*, No. 12-1660, 2013 WL 3742496, at 11-12 (D.D.C. July 17, 2013).

[1047] See *Memphis Publishing Co. v. FBI*, No. 10-1878, 2012 WL 269900, at 6-7 (D.D.C. Jan. 31, 2012) (contending that while in the context of Glomarization "the agency must reveal the fact of and grounds for any withholdings [of records and information]," the exclusions "permit the government to treat requests for records as falling outside the scope of the [FOIA].")

[1048] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act for Executive Departments and Agencies Concerning the Law Enforcement Amendments (December 1987), available at https://www.justice.gov/archive/oip/86agmemo.htm.

records. In such situations, "the more delicate exclusion mechanism" should apply, as it "affords a higher level of protection […]."[1049]

L. Memoranda Issued By the President and the Attorney General on Implementation of the FOIA: Present and Past Experiences

1. President Obama on Transparency and the FOIA

Each presidential administration adopts its own policy on disclosure of agency records and thus its own guidelines for implementation of the FOIA. On his first full day upon taking office, January 21, 2009, President Obama issued two different – yet related – memoranda: one on transparency and open government [hereinafter – Transparency Memo][1050], and the other specifically devoted to the FOIA [hereinafter – FOIA Memo][1051]. Splitting formally issues concerning transparency from issues concerning the FOIA into two presidential documents proves a wise choice. The scope of transparency, indeed, does not coincide with access to agency records and information, for the very concept of transparency is broader. American scholars, however, tend to not pierce too much into this concept. They often underestimate the principle that a transparent agency is an agency that not only publishes online or releases upon request its records, but also makes understandable the information included in those records. Fenster is one of the scholars who has grasped the difference between accessibility and understandability of information by observing that "government information laws [such as the FOIA usually] require simply that information be made available, not that it should be useful or understandable to the public."[1052] On the one hand, a commitment to ensuring that executive branch information be easily comprehended by citizens is not easy to honor, and raises some issues, both theoretical and practical[1053]. On the other hand, comprehensibility is an added value of information, which benefits not only the public, but agencies as well. As Fenster himself has argued,

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[1049] Ibid.

[1050] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) [Transparency Memo].

[1051] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [FOIA Memo].

[1052] MARK FENSTER, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 942 (2006).

[1053] Ibid. ("Imposing some form of a comprehensibility requirement on government is fraught with difficulties, from the problem of definition (what precisely constitutes 'comprehensible'?) to enforcement issues (are courts to evaluate what constitutes 'comprehensible'?).")

"[g]overnment disclosures more readily produce better public understanding and decision-making not merely when they are made available as raw information, but when they are made available in a way that the public can understand."[1054] Despite embracing the added value of comprehensibility, however, transparency is inextricably intertwined with access to information, which constitutes the core of transparency. Accordingly, openness, a concept that is realized either by publishing information proactively or by disclosing it in response to a specific request, is frequently conceived of as a synonym to transparency. In the Transparency Memo, President Obama states that his administration "is committed to creating an unprecedented level of openness in Government,"[1055] and pinpoints transparency as one of the cardinal components of his open Government program[1056]. The Transparency Memo also concedes that access to information held by departments and agencies is an integral part of transparency by contending that transparency, which promotes accountability, requires that the executive branch make available to American citizens information "about what their Government is doing."[1057]

In his FOIA Memo, President Obama directs agencies to make disclosure prevail over secrecy whenever possible. In corroboration of the close relation existing between transparency and access to agency records, the FOIA Memo begins with the following sentence: "A democracy requires accountability, and accountability requires transparency."[1058] The FOIA Memo considers the FOIA to be not only an instrument aimed at realizing accountability through transparency, but – more generally – "the most prominent expression of a profound national commitment to ensuring an open Government."[1059] The FOIA Memo establishes a criterion executive departments and agencies are supposed to follow when applying FOIA provisions: "In the face of doubt, openness prevails [over the withholding of information]." Therefore, the FOIA Memo invites agencies to opt for disclosure whenever they are not sure whether the application of a given FOIA exemption is necessary to protect an essential interest of the United States. Furthermore, agencies are expressly forbidden from invoking one or more FOIA exemptions "merely because public

[1054] Ibid.

[1055] Transparency Memo, supra note 1050, ibid.

[1056] The other two components are public participation in the formation of Federal Executive's policies, and collaboration, which "actively engages Americans in the work of their Government." Ibid.

[1057] Ibid.

[1058] FOIA Memo, supra note 1051, ibid.

[1059] Ibid.

officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." This prescription aimed at preventing any misuse or abuse in the usage of the FOIA exemptions is a direct consequence of the principle that "a presumption in favor of disclosure […] should be applied to all decisions involving FOIA." Such a presumption – the FOIA Memo continues – also requires that agencies "take affirmative steps to make information [available to anyone without waiting] for specific requests from the public," and thus engage in the proactive disclosure of records, information, and documents[1060].

2. Attorney General Holder's Memorandum on Implementation of the FOIA Compared To the Memoranda Issued By Ashcroft in 2001 and By Reno in 1993

On March 19, 2009, Attorney General Eric H. Holder, Jr., issued a memorandum on implementation of the FOIA [hereinafter – Holder FOIA Memo][1061]. The Holder FOIA Memo is explicitly aimed at confirming President Obama's commitment to considering transparency and open Government as the cardinal values of his administration and at ensuring that such a commitment be honored. The presumption in favor of disclosure any FOIA decision has to be based on – the Holder FOIA Memo observes – has two major implications. Firstly, agencies should not withhold information from access just because one or more FOIA exemptions have standing to operate. To put it differently, the application of FOIA exemptions should not be an automatic consequence of the legitimacy of the exemptions in a given case, according to an agency's assessment. The Holder FOIA Memo, accordingly, "strongly encourage[s] agencies to make discretionary disclosures of information," and thus to exercise discretion to release requested information even when one or more FOIA exemptions may be lawfully invoked[1062]. As the Supreme Court underlined in Mink, indeed, the withholding of information falling within a given FOIA exemption is not mandatory, as Congress meant to establish in section 552(b) the categories of

[1060] Ibid.

[1061] Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [Holder FOIA Memo], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[1062] The underlying principle is that in enacting the FOIA, Congress conceded that agencies enjoy the necessary discretion to prefer openness to secrecy when they deem the release of information to not endanger an essential interest the protection of which could justify the application of a FOIA exemption. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 296 (1979) (contending that "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA.")

information that federal agencies "must have the option to keep confidential, if it so chooses."[1063] Secondly, agencies should abide by the "'reasonably segregable' obligation" as much as possible, and thus ensure partial disclosure whenever the record or records requested under the FOIA may not be released but not even withheld in their entirety. The Holder FOIA Memo, indeed, reminds agencies that "the FOIA requires them to take reasonable steps to segregate and release nonexempt information."[1064] However, there is just a presumption in favor of disclosure, a presumption that may be overcome whenever the withholding of information is necessary to protect the essential interests the FOIA acknowledges.

Furthermore, the Holder FOIA Memo expressly rescinds the former memorandum on implementation of the FOIA, issued by then-Attorney General John Ashcroft on October 12, 2001 [hereinafter – Ashcroft FOIA Memo][1065]. This notorious memorandum, which – in turn – superseded the memorandum on the FOIA issued by Attorney General Janet Reno on October 4, 1993 [hereinafter –Reno FOIA Memo][1066], revealed President George W. Bush's penchant for secrecy[1067]. As has been noted, the Ashcroft FOIA Memo "mark[ed] a dramatic shift from the [disclosure] policies espoused in the Reno memo."[1068] The attacks of September 11, 2001, on U.S. soil certainly affected the development of such a penchant[1069].

[1063] *Mink*, supra note 858, at 80.

[1064] Holder FOIA Memo, supra note 1061, ibid.

[1065] Attorney General Ashcroft's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (October 12, 2001) [Ashcroft FOIA Memo], available at https://www.justice.gov/archive/oip/011012.htm.

[1066] Attorney General Reno's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (October 4, 1993) [Reno FOIA Memo], available at http://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum.

[1067] See, e.g., TIMOTHY W. MAIER, *Bush Team Thumbs Its Nose at FOIA*, Insight on the News (April 29, 2002), at 20 (quoted in KEITH ANDERSON, *Is There Still a "Sound Legal Basis?": The Freedom of Information Act in the Post-9/11 World*, 64 Ohio St. L. J. 1605, 1623 (2003)) (statement of Tom Blanton) ("The Bush Administration is mounting the most sustained assault on open government since the early Reagan administration or perhaps even since President Gerald Ford vetoed the FOIA amendments in 1974.") On the phrase "penchant for secrecy," see STEVEN AFTERGOOD, *Secrecy News* (September 19, 2002) (quoted in METCALFE, *The nature of government secrecy*, supra note 10, at 305 note 3 ("For good and sufficient reason, the coinage 'penchant for secrecy' is well on its way to becoming a cliché, having been used to describe the Bush Administration some 200 times in the past year.")

[1068] PAUL M. SCHOENHARD, Note, *Disclosure of Government Information Online: A New Approach From an Existing Framework*, 15 Harv. J.L. & Tech. 497, 503 (2002).

[1069] A famous statement of President Bush reads as follows: "We're an open society, but we're at war […]. Foreign terrorists and agents must never again be allowed to use our freedoms against us.")

The Ashcroft FOIA Memo starts off by assuring that the Bush administration is committed to complying with FOIA provisions and by conceding that "a well-informed citizenry," other than acting as a deterrent for any wrongdoing, is crucial to a Government that is effectively accountable to the American people[1070]. The Ashcroft FOIA Memo, however, also underscores that the Federal Executive is "equally committed to protecting other fundamental values," some of which are mentioned: national security; law enforcement; the confidentiality of sensitive business information; privacy. In addition, Exemption 5 of the FOIA and the various privileges it includes – namely, the deliberative process privilege, the presidential communications privilege, and the attorney-client privilege – are expressly referred to as a further limit to the disclosure of executive branch information[1071].

Accordingly, the Ashcroft FOIA Memo encourages departments and agencies "to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA."[1072] Contrary to the spirit of the Holder FOIA Memo, it is established an evident presumption against openness, and thus in favor of secrecy. Agencies are instructed to exercise their discretionary powers to release agency records and information "only after full and deliberate consideration" of the values and interests to which the memorandum refers. In other words, agencies should opt for disclosure of records, information, and documents only when they cannot detect any trace of legitimacy for the invocation of one or more FOIA exemptions. The Ashcroft FOIA Memo, indeed, establishes

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BRAD KNICKERBOCKER, *Security Concerns Drive Rise in Secrecy*, Christian Sci. Monitor (December 3, 2001), available at http://www.csmonitor.com/2001/1203/p1s3-ussc.html. But see also METCALFE, *The nature of government secrecy*, supra note 10, at 305 note 2 (arguing that "the Bush Administration already was beginning to earn a well-deserved reputation for secrecy even before the events of September 11, 2001."); ALASDAIR ROBERTS, *Blacked Out: Government Secrecy in the Information Age*, 36 (Cambridge University Press, 2006) (contending that "[i]n the United States, the process of rebuilding [the] walls of secrecy had begun even before the terror attacks of September 11, 2001.") While at the beginning of the 1990s, the Federal Government had taken on initiatives aimed at declassifying a vast amount of sensitive information related to the Cold War era, the need for secrecy was back at the forefront among government concerns towards the end of that decade. Ibid.

[1070] Ashcroft FOIA Memo, supra note 1065, ibid.

[1071] Ibid. ("Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.")

[1072] Ibid.

a "sound legal basis" standard, to which the withholding of information from access by the public is subject. Such a standard pinpoints the minimum threshold not only for the denial of FOIA requests by agencies, but also for the intervention of the Department of Justice in judicial proceedings in defense of agencies withholding information. The Ashcroft FOIA Memo states that the Department of Justice will be committed to defending agency determinations that refuse the release of records and information "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." Therefore, if such conditions are not met, agencies may depend on the Department of Justice taking care of the defense of any determination of withholding information before federal judges. As has been argued, departments and agencies are invited "to be more aggressive in denying FOIA requests and not be concerned about going to court."[1073] It appears to be quite surprising that someone has gone so far as to hold that under the Ashcroft FOIA Memo, the authentic spirit of the FOIA was preserved[1074]. This memorandum, actually, implements what has been emphatically labeled as a "Government's information clampdown."[1075] Such a policy also includes the removal of a good deal of information formerly published on federal agencies' official websites or the restriction of access to material still available online[1076]. If on the one hand the Ashcroft FOIA Memo does not formally amend any FOIA provisions[1077], for – as a set of guidelines – it has no authority to do so, it has been observed on the other hand that it brings about a passage from a principle of right to know, inherent to the FOIA, to a principle of need to know[1078]. Uhl has argued that the Ashcroft FOIA Memo "effectively requires the public to

[1073] MAIER, *Bush Team Thumbs Its Nose at FOIA*, supra note 1067, ibid. (quoted in ANDERSON, *Is There Still a 'Sound Legal Basis.'*, supra note 1067, at 1622) (statement of Professor Robert Vaughn).

[1074] See ANDERSON, *Is There Still a 'Sound Legal Basis.'*, at 1624-1625 ("The Ashcroft Memo, like all Attorney General Memos, may be a shift in policy for our current environment, but the guidelines and spirit of FOIA have not been diminished.")

[1075] SCHOENHARD, Note, *Disclosure of Government Information Online*, supra note 1068, at 502.

[1076] Id., at 502-503, 516-520.

[1077] See ANDERSON, *Is There Still a 'Sound Legal Basis.'*, supra note 1067, at 1622 (arguing that "while the Justice Department has recognized this memorandum as a shift in overall FOIA policy, the statutory language has not changed.")

[1078] See GENERAL ACCOUNTING OFFICE, *Information Management. Update on Implementation*, supra note 921, ibid. (noting that according to some FOIA requesters, the polices on the FOIA adopted by the Department of Justice in the aftermath of the 9/11 attacks marked "a shift from a 'right to know' to a 'need to know' that could discourage the public from making requests.") See also LAURA PARKER et al., *Secure Often Means Secret*, USA TODAY (May 16, 2002), currently available at http://newsmine.org/content.php?ol=security/legislation/national-secrets/secret-

have a 'need to know' the information it requests, the same legal standard that existed prior to the enactment of FOIA in 1966."[1079] Such a burden of proof on the part of FOIA requesters ends up offering agencies "a green light"[1080] – actually, not far from consisting in a blank check – to restricting access to executive branch information.

Furthermore, it has been noted[1081] that just a few days after the Ashcroft FOIA Memo was issued, Deputy Defense Secretary Paul Wolfowitz adopted a similar memorandum within the Department of Defense [hereinafter – Wolfowitz Memo][1082]. That the Wolfowitz Memo perfectly fits into the climate following the terrorist attacks on U.S. soil is showed by a statement according to which "the security of information critical to the national security [of the United States] will remain at risk for an indefinite period."[1083] The Wolfowitz Memo also invites the agencies within the Department of Defense to take into full consideration the possibility of withholding not classified information because that information, despite not possessing a classification marking, "can often be compiled to reveal sensitive conclusions." As Schoenhard has correctly observed[1084], such a statement embodies the so-called mosaic theory or "mosaic approach."[1085] In 1991, the Department of Justice explained that such an approach rests on "the concept that apparently harmless pieces of information, when assembled together, could reveal a damaging picture."[1086] Deyling has pointed out that this

information.txt (statement of Gary Bass, executive director of OMB Watch) ("We seem to be shifting to the public's need to know instead of the public's right to know."); TOM BEIERLE – RUTH GREENSPAN BELL, *Don't Let 'Right to Know' Be a War Casualty,* Christian Sci. Monitor, December 20, 2001, at 9 ("Years of hard-won battles that turned FOIA into a fundamental routine bulwark against government secrecy were undermined in a day. The memo ushered out the principle of 'right to know' and replaced it with 'need to know.' Now, the presumption is that information is inherently risky.")

[1079] KRISTEN E. UHL, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 Am. U. L. Rev. 261, 285 (2003).

[1080] Id., at 286.

[1081] See SCHOENHARD, Note, *Disclosure of Government Information Online*, supra note 1068, at 505.

[1082] Deputy Secretary of Defense Paul Wolfowitz's Memorandum to the Department of Defense Concerning Operations Security Throughout the Department of Defense (October 18, 2001) [Wolfowitz Memo], available at http://www.fas.org/sgp/news/2001/10/wolfowitz.html.

[1083] Ibid.

[1084] See SCHOENHARD, Note, *Disclosure of Government Information Online*, supra note 1068, at 506.

[1085] DEP'T OF JUSTICE, *Guide to the Freedom of Information Act*, in ID., *Freedom of Information Case List*, 425 (1991 ed.) (quoted in ROBERT P. DEYLING, *Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act*, 37 Vill. L. Rev. 67, 84 (1992)).

[1086] DEP'T OF JUSTICE, *Guide to the Freedom of Information Act*, ibid.

theory, which represents an "amorphous yet effective" argument against disclosure[1087], was recognized by the executive order on classification of national security information issued by President Reagan on April 2, 1982[1088]. Section 1.3(b) of the executive order, indeed, empowered an original classification authority to classify information also when it determined that the unauthorized disclosure of such information, "either by itself *or in the context of other information*, reasonably could be expected to cause damage to the national security."[1089] It is correct to say that the mosaic theory made a comeback during the Bush administration, as shown by *Center for National Security Studies v. Dep't of Justice*[1090], which Pozen has defined "a landmark post-9/11 mosaic theory case […]."[1091] Schoenhard has argued that the mosaic theory appears to be reasonable in its purely theoretical formulation, yet it is inconsistent with Congress's intent that the FOIA exemptions should be narrowly construed and interpreted[1092]. The Wolfowitz Memo concludes by contending that it is necessary for theepartment of Defense "[to] deny our adversaries the information essential for them to plan, prepare or conduct further terrorist or related hostile operations against the United States and this Department."[1093]

The Holder FOIA Memo adopted a new standard for the defense of agencies by the Department of Defense in FOIA litigation. In conformity with the presumption of disclosure this memorandum establishes, the Department of Justice will take the commitment to defending before a court an agency that has denied access to records and information if two pre-fixed requirements are disjunctively met. The Department of Justice will provide its defense to an agency that either "reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions," or is supposed to withhold the requested information, as "[its] disclosure is prohibited by law."[1094] The standard established by the

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[1087] DEYLING, *Judicial Deference and De Novo Review*, supra note 1085, ibid.

[1088] President Ronald Reagan, Executive Order 12356 ("National Security Information"), April 2, 1982 available through GERHARD PETERS – JOHN T. WOOLLEY, *The American Presidency Project*, at http://www.presidency.ucsb.edu/ws/?pid=42356. See DEYLING, *Judicial Deference and De Novo Review*, ibid. See also DAVID E. POZEN, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 Yale L. J. 628, 641 (2005) (arguing that President Reagan's executive order 12,356 of 1982 "wrote the [mosaic] theory into law.")

[1089] Executive Order 12356 (emphasis added).

[1090] 331 F.3d 918 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004).

[1091] POZEN, *The Mosaic Theory,* supra note 1088, at 658.

[1092] See SCHOENHARD, Note, *Disclosure of Government Information Online*, supra note 1068, at 506.

[1093] Wolfowitz Memo, supra note 1082, ibid.

[1094] Holder FOIA Memo, supra note 1061, at 2.

Holder FOIA Memo results in a reversal of that contained in the Ashcroft FOIA Memo, which – in turn – replaced the so-called "foreseeable harm" standard, effective under the Clinton administration. As Schoenhard has noted, the Clinton administration "embarked on a campaign to release unprecedented quantities of information to the public."[1095] On October 4, 1993, President Clinton adopts a memorandum encouraging agencies to comply with "the letter and spirit" of the FOIA above all by engaging in proactive disclosures and making executive branch information available online[1096]. On the same day, Attorney General Reno issues a memorandum on implementation of the FOIA setting forth the "foreseeable harm" standard as the criterion under which the Department of Justice will defend in court an agency determination of withholding information. Such a criterion is based on "a presumption of disclosure."[1097] In light of the "principle of openness in government," agencies are instructed to respond to FOIA requests by a denial only after considering the potentially beneficial consequences of disclosure. The Reno FOIA Memo expressly states that under the Clinton administration, the DOJ will not support in court agency decisions to withhold information merely based on the existence of a "substantial legal basis" for applying a FOIA exemption. Accordingly, the DOJ will defend the withholding of information from public access in FOIA litigation only when an agency "reasonably foresees that disclosure would be harmful to an interest protected by that exemption." Such a standard – the Reno FOIA Memo continues – "serves the public interest by achieving the Act's primary objective – maximum responsible disclosure of government information – while preserving essential confidentiality." If it is so, it is impossible not to agree with Piotrowski, who has observed that the standard set forth by the Ashcroft FOIA Memo "differ[red] in tone and fact from the 'foreseeable harm' standard used by the Clinton Administration."[1098] The presumption of disclosure has taken prominence again with the Holder FOIA Memo, which has substantially brought the line separating openness and secrecy back to the level that existed under President Clinton. As Metcalfe has argued, the Holder FOIA Memo "re-institutes […] the 'foreseeable harm' standard and its twin concept of 'discretionary

[1095] SCHOENHARD, Note, *Disclosure of Government Information Online*, supra note 1068, at 500.
[1096] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (October 4, 1993).
[1097] Reno FOIA Memo, supra note 1066, ibid.
[1098] SUZANNE J. PIOTROWSKI, *Governmental Transparency in the Path of Administrative Reform*, 98 (State University of New York Press, Albany, NY, 2007).

disclosure' to govern the defense of FOIA litigation and thus FOIA decisionmaking governmentwide."[1099]

M. Specific Issues Concerning Two FOIA Exemptions

1. Exemption 5: Agencies May Not Be Forced To "Operate in a Fishbowl"

As Senate Report No. 813 of 1966 points out, Exemption 5 is aimed at enabling the "frank discussion of legal and policy issues in writing" within each agency and between agencies, which would be impossible if all documents containing internal opinions and communications "were to be subjected to public scrutiny."[1100] The efficiency of the executive branch – the report continues – would be severely undermined if in giving and receiving advice, exchanging views, and formulating polices, agencies "were prematurely forced to 'operate in a fishbowl.'"[1101] The image of a fishbowl to refer to an excessive level of openness – in this case a synonym to transparency – is found in House of Representatives Report No. 1497 of 1966, as well. The message the House of Representatives intends to convey is the same as the Senate's: In the conduct of agency business, "a full and frank exchange of opinions would be impossible if all internal communications were made public."[1102] The fishbowl in which the whole executive branch would end up being inserted if it was not allowed to keep at least part of its internal activities secret would compromise the frankness of "advice from staff assistants and [of] the exchange of ideas among agency personnel […]."[1103] I see it proper to clarify that I just used the phrase "at least part of its internal activities secret" on purpose, since – apart from what I will stress later about the difference between the deliberative process privilege and the presidential communications privilege – the statutory language itself excludes that the secrecy of such activities could be absolute. Exemption 5 of the FOIA, indeed, allows agencies to withhold from access inter-agency and intra-agency memoranda and letters when they "would not be available by law to a party other than an agency in litigation with the agency." The original version of the FOIA, instead, was slightly different in this regard, as it made reference to memoranda and

[1099] DANIEL METCALFE, *Sunshine Not So Bright: FOIA Implementation Lags Behind*, 34 Admin & Reg. L. News, 6 (2009).
[1100] S. Rep. No. 813, in *1966 Source Book*, at 44.
[1101] Ibid.
[1102] H.R. Rep. No. 1497, reprinted in *1966 Source Book*, at 31.
[1103] Ibid.

letters "which would not be available by law to a private party in litigation with the agency." House Report No. 1497 of 1966 explains this clause by noting that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."[1104] As early as 1969, the Court of Appeals for the District of Columbia conceded that "the free and uninhibited exchange and communication of opinions, ideas, and points of view" between the employees of an agency and of different agencies interacting with one another proves essential to the functioning of a ponderous administrative state like that of the United States at federal level[1105]. In brief, the purpose of Exemption 5 of the FOIA is to protect the quality of agency decision-making in its formation[1106].

The scope of Exemption 5 is considered to include not only the deliberative process privilege, aimed at safeguarding – as just noted – the quality of agency decision-making, but also the presidential communications privilege. That Exemption 5 is capable of embracing either privilege could already be inferred by House Report No. 1497, which pinpoints the purpose of the exemption as that to ensure the candor not only of the exchange of ideas among agency personnel, but also of the advice expressed by "staff assistants."[1107] The presidential communications privilege, indeed, protects from disclosure White House communications – namely, advice the President receives from the members of his staff and other advisors. The phrase "staff assistants" House Report No. 1497 uses, therefore, may be interpreted so broadly to contemplate the need for secrecy that the presidential communications privilege implies. Furthermore, the close relation between the deliberative process privilege and the presidential communications privilege is shown by the historical roots of the former. Weaver and Jones, indeed, have pointed out that the deliberative process

[1104] Ibid. See also *Mink*, 410 U.S., supra note 858, at 90 (holding that pursuant to Exemption 5, "the public's access to internal memoranda will be governed by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies.")

[1105] *Ackerley v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[1106] See STEPHEN G. BREYER – RICHARD B. STEWART, *Administrative Law and Regulatory Policy: Problems, Text, and Cases*, 940 (3rd ed., Little Brown, 1992) (quoting S. Rep. No. 813, in *1966 Source Book*, at 44) (arguing that "the quality of administrative decision-making would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas on legal or policy matters would be impossible.")

[1107] H.R. Rep. No. 1497, reprinted in *1966 Source Book*, at 31.

privilege "originated in the principles underlying the English 'crown privilege.'"[1108] The presidential communications privilege *sensu stricto* is aimed at shielding from access by the public advice and opinions that the President's aides and staff members direct to the President himself in his decision-making process. In this sense, the presidential communications privilege constitutes the core of executive privilege, as applied not to the political sphere of the relations between the legislative and executive branches, but within the scope of the FOIA[1109]. The deliberative process privilege and the presidential communications privilege share the objective to protect executive branch decision-making, either at presidential or at agency level. It is interesting in this regard the definition given by Cann of the executive privilege provided for in Exemption 5 as "decisional executive privilege," a definition that emphasizes that the purpose of the privilege is "to preserve the integrity of the decision-making process."[1110] Executive privilege as contemplated in Exemption 5 of the FOIA – the Author has explained – "means to ensure that an option, piece of advice, or information is not withheld from the decision maker's consideration out of fear that the advice will be held up to public ridicule at a later date."[1111] Courts, too, have assimilated the deliberative process privilege and the presidential communications privilege because of their common purpose to safeguard and thus to improve the quality of decision-making entrusted to the executive branch. In *Nixon v. Sirica*[1112], one of the cases concerned with access to Watergate tape-recordings, the Court of Appeals for the District of Columbia first observed that a claim of executive privilege entails careful consideration and balancing of two conflicting public interests – that in keeping confidentiality of executive branch information and that in obtaining access to such information, with all related boons that disclosure may bring[1113]. The Court then contended that since the presidential communication privilege is aimed at "protect[ing] the effectiveness of the executive decision-making process," it turns out to be very similar to the privilege provided for in

[1108] RUSSEL L. WEAVER – JAMES T.R. JONES, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 283 (1989).

[1109] See KITROSSER, *Secrecy and Separated Powers*, supra note 65, at 491-492 ("A claim of executive privilege is generally a claim by the President of a constitutional right to withhold information from Congress, the courts, or persons or agencies empowered by Congress to seek information.")

[1110] STEPHEN J. CANN, *Administrative Law*, 221-222 (4th ed., Sage Publications, 2006).

[1111] Id., at 222.

[1112] 487 F.2d 700 (D.C. Cir. 1973).

[1113] Id., at 716 (arguing that from the early-nineteenth century Burr case can be inferred that the "application of executive privilege depends on a weighing of the public interest protected by the privilege against the public interest that would be served by disclosure in a particular case.")

Exemption 5 of the FOIA[1114]. In 2008, the same court held that Exemption 5 encompasses both the deliberative process privilege and the presidential communications privilege in its scope[1115].

However, Exemption 5 does not operate in the same manner with respect to the deliberative process privilege and the presidential communications privilege. Even though the two privileges share a common substratum – which consists in executive privilege[1116] – their scope is not entirely equivalent, as the Court of Appeals for the District of Columbia highlighted in In re Sealed Case[1117], the leading case as to the distinction between these privileges. Firstly, the Court concedes the basic difference between the deliberative process privilege and the presidential communications privilege. Indeed, even though they are both "designed to protect executive branch decisionmaking," the former is concerned with the executive branch as a whole, as it protects the candor of departments' and agencies' decision-making, while the latter applies "specifically to decisionmaking of the President."[1118] Secondly, the Court notes that the latter also turns out to be a stronger privilege[1119]. Unlike the deliberative process privilege, indeed, the presidential communications privilege ensures the ability to keep secret "documents in their entirety, and [therefore] covers final and post-decisional materials as well as pre-deliberative ones."[1120] Even though the primary purpose of the presidential communications privilege is to shield from access the "candid advice" the President receives from his aides and staff members, and thus may appear to be concerned only with predeliberative material, precedent suggests that the scope of the privilege goes

[1114] Id., at 717.

[1115] See *Loving v. Dep't of Defense*, 550 F.3d, supra note 1023, at 37 ("Exemption 5 incorporates two executive privileges that are relevant here: the presidential communications privilege and the deliberative process privilege.")

[1116] See *NLRB v. Sears, Roebuck & Co.*, 421 U.S., supra note 932, 150 (1975) supra (referring to S. Rep. No. 813, in *1966 Source Book*, at 44; H.R. Rep. No. 1497, reprinted in id., at 31; *Mink*, 410 U.S., supra note 858, at 87) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear.")

[1117] See *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) ("While the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes.")

[1118] Ibid.

[1119] Id., at 746 (arguing that "while both the deliberative process privilege and the presidential privilege are qualified privileges, the Nixon cases suggest that the presidential communications privilege is more difficult to surmount.")

[1120] Id., at 745.

beyond "the deliberative or advice portions of documents."[1121] The deliberative process privilege, instead, has been traditionally meant as allowing for only the withholding of predecisional memoranda, letters, and communications in general within an agency or between agencies. As Weaver and Jones have observed, since this privilege is aimed at ensuring the frank exchange of ideas and opinions between agency employees and thus at safeguarding the quality of agency decision-making in its formation, "[such] concerns are not present with postdecisional communications."[1122] If an agency has already made a decision, such a decision becomes of public domain – the Authors continue – because "there are no deliberations to be stifled [by access to them by the public]."[1123] The scope of the presidential communications privilege, however, is not unlimited. Not only did the Supreme Court in Nixon hold that despite being rooted in the U.S. Constitution, executive privilege may not be considered absolute[1124]. The Court of Appeals for the District of Columbia also limited the presidential communications privilege on the side of the range of persons to whom it applies by contending in In re Sealed Case that "[n]ot every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege."[1125] The staff of the President's advisors who work for federal agencies, in particular, may not invoke the privilege to refuse the release of their communications[1126]. The presidential communications privilege, instead, applies "to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate."[1127]

[1121] Ibid.

[1122] WEAVER – JAMES T.R. JONES, *The Deliberative Process Privilege*, supra note 1108, at 290.

[1123] Id., at 291.

[1124] See supra.

[1125] *In re Sealed Case*, 121 F.3d, supra note 1117, at 752.

[1126] Ibid.

[1127] Ibid. See also *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004).

2. Exemption 1: The Exemption Pertaining to National Security

a. The FOIA Amendments Act of 1974: *In Camera* Inspection of Classified Information

The FOIA Amendments Act of 1974, which Congress passed after President Ford exercised its veto power[1128], amended significantly Exemption 1 of the FOIA to overrule the restrictive interpretation of this exemption set out by the Supreme Court in Mink[1129]. Congress's Conference Report on the 1974 amendments, indeed, expressly states that Exemption 1 of the FOIA was amended so as to permit, contrary to what the Supreme Court ruled in Mink, "*in camera* examination [of documents withheld pursuant to section 552(b)(1)] at the discretion of the court."[1130] The report underscores that albeit not mandatory, *in camera* examination will be "necessary and appropriate" on many occasions. Before issuing an order that subjects classified documents to *in camera* inspection, however, the court – the report argues – has to provide the agency who holds such classified material with "the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure."[1131]

Under the version of the FOIA that became effective in 1967, exemption 1 consisted in a very laconic provision that allowed agencies to withhold from access matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." In Mink, the Supreme Court ruled that judicial review in an Exemption 1 case was restricted to determining whether the competent agency had duly classified information pertaining to either the domain of national security or that of foreign

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[1128] For an accurate analysis of legislative history of the 1974 statute that constituted the first major amendment to the FOIA, see *Ray v. Turner*, 587 F.2d 1187, 1201-1215 (D.C. Cir. 1978) (Wright, J., concurring). Different bills aimed at amending the FOIA were introduced in the House of Representatives (H.R. 12471) and in the Senate (S. 2543). In a Senate report accompanying S. 2543, Rep. No. 854, Sen. Edward M. Kennedy argued that at the time of the introduction of the bill in the Senate, the FOIA "ha[d] become a 'freedom from information' law, with the curtains of secrecy still tightly drawn around the business of government." S. Rept. No. 93-854, 93rd Cong., 2nd Sess. (May 16, 1974), reprinted in *1975 Source Book*, at 155.

[1129] See Note, *National Security and the Amended Freedom of Information Act*, 85 Yale L. J. 401, 403 (1976). But see also Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 Harv. L. Rev. 906, 908-909 (1990) (pointing out that in addition to the Supreme Court decision in *Mink*, the attempts of President Nixon to put the Watergate scandal and related White House conversations under a veil of secrecy prompted Congress to amend the FOIA in such a consistent fashion).

[1130] H. Rept. 93-1380 (also published as S. Rept. 93-1200) (September 25, 1974, and October 1, 1974) – Conference report of 1974 amendments, reprinted in *1975 Source Book*, at 226.

[1131] Ibid.

affairs. Courts, instead, were not allowed to assess the "soundness" of classification decisions[1132], which therefore were always legitimate, i.e., compatible with the FOIA, provided that classification proceedings had been followed. To put it differently, the Mink majority opinion argued that federal judges were just empowered to ascertain whether the information the access to which had been denied to a FOIA requester was in fact stamped as classified, but not also whether the classification complied with the standards established in the *ad hoc* Executive order. Furthermore, the Supreme Court held that Exemption 1 may not be interpreted so as to entrust courts with authority to conduct "in camera inspection of a contested document bearing a single classification," and accordingly, as to material subject to classification, courts were not permitted to "separate the secret from the supposedly nonsecret [portion of a document] and order disclosure of the latter."[1133]

The amendments brought to Exemption 1 in 1974 expressly allowed courts to conduct in *camera* inspection of classified material to determine whether such material had been properly classified. As a result, courts may review *de novo* the withholding of information determined by agencies even when classified information is at issue in a FOIA case[1134]. As correctly argued, by amending Exemption 1, Congress meant "to empower courts to exercise 'effective judicial review of executive branch classification decisions' in order to rectify the 'widespread overclassification abuses in the use of classification stamps.'"[1135] Under the new version of Exemption 1, as a note published in the Yale Law Journal explained, "courts will be expected to review both the procedural and substantive adequacy of executive classification."[1136] The Conference Report, however, also concedes that agencies operating in the fields of national security and foreign affairs "have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record."[1137] Accordingly, in determining whether the material withheld from a FOIA requester has been properly classified, federal courts are supposed to "accord substantial weight" to agency affidavits, i.e., opinions – *rectius*, declarations – agencies

[1132] *Mink*, 410 U.S., supra note 858, at 84.
[1133] Ibid.
[1134] See *Ray v. Turner*, supra note 1128, at 1195 (observing that "[a] judge has discretion to order in camera inspection [of records and documents at issue in FOIA litigation] on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination.")
[1135] Note, *National Security and the Amended Freedom of Information Act*, supra note 1129, at 402 (quoting 120 Cong. Rec. S9316 (May 30, 1974) (remarks of Sen. Edward M. Kennedy)).
[1136] Id., at 403.
[1137] H. Rept. 93-1380 – S. Rept. 93-1200, supra note 1130, at 229.

deploy to describe the content of such material and set out the reasons for its classification[1138].

b. Judicial Deference to Agency Determinations on Classified Information

Executive branch expertise in the domains of national security and foreign affairs, and the usage of agency affidavits are the main reasons for a phenomenon that has always been peculiar to those domains – judicial deference to agency determinations. Since the enactment of the FOIA, indeed, courts have shown a marked tendency to being deferential towards agency classification decisions. As Pozen has noted, in Exemption 1 cases, courts "do not typically assess whether the alleged risks of disclosure [, which, according to an agency determination, justify the classification of certain information] would be likely to materialize, or weigh those risks against other interests."[1139] The expertise of agency officials in the fields of national security and foreign affairs underpins such a deference. Furthermore, judicial deference goes beyond the scope of Exemption 1. Since Exemption 3 incorporates into the FOIA those provisions contained in other federal statutes granting agencies authority to withhold information from general access, deference usually extends to such provisions, as well, whenever they are concerned with national security. Judicial deference, for instance, extends to the National Security Act of 1947[1140], as amended, insofar as it contains nondisclosure provisions. As noted above, under current section 3024(i)(i) of title 50, U.S. Code, the Director of National Intelligence is empowered to deny the general public access to information concerning "sources and methods" used by agencies belonging to the Intelligence Community. In FOIA cases concerning application of this provision, indeed, agency affidavits are expected to sustain the withholding of information, and hence judicial deference is most likely to ensue[1141].

[1138] Ibid. See DEYLING, *Judicial Deference and De Novo Review*, supra note 1085, at 78 (noting that such passages from the Conference Report "as been cited often by the courts since 1974 as definitive evidence that Congress meant the courts to show deference toward executive agency claims that information is properly classified.")

[1139] POZEN, *The Mosaic Theory*, supra note 1088, at 637.

[1140] Pub. L. No. 80-235, 61 Stat. 496 (July 26, 1947), currently codified at 50 U.S.C. 3001 et seqq.

[1141] See *Center for National Security Studies*, 331 F.3d, supra note 1090, at 939 (Taft, J., dissenting) (noting that the Court of Appeals for the District of Columbia has accorded the same high level of deference to Exemption 3 as it is used to applying in Exemption 1 cases, insofar as Exemption 3 is the means whereby the National Security Act of 1947 is incorporated into the FOIA). That specific FOIA litigation, however, was concerned with Exemption 7, and by rendering a dissenting opinion,

The Court of Appeals for the District of Columbia clarified such a deferential approach in a case decided three years after Exemption 1 was amended, in 1977, by observing that "[f]ew judges have the skill or experience to weigh the repercussions of disclosure of intelligence information."[1142] If an agency has followed classification procedures and has provided elucidation – through affidavits – on the reasons for stamping as classified the material at issue in a FOIA case in a way that appears to be logic and coherent, the court should determine that such an agency has met the burden of proof for the withholding of documents and information. Whether or not an *in camera* inspection of classified information is conducted – the D.C. Circuit continued – the court "need not go further to test the expertise of the agency, or to question its veracity [, i.e., the veracity of agency affidavits,] when nothing appears to raise the issue of good faith."[1143] The Court of Appeals for the District of Columbia again pinpointed – probably, even more effectively – the essence of judicial deference in a 1980 decision – *Halperin v. CIA*[1144] – by contending that judges usually "lack the expertise necessary to second-guess […] agency opinions in [a] typical national security FOIA case."[1145] Accordingly, the Court concluded, a "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications [of the disclosure of classified material]."[1146] Even though scholars have at

Judge Taft objects to the majority opinion's decision to grant analogous deference to an Exemption 7 case.

[1142] *Weissman v. Central Intelligence Agency*, 565 F.2d 692, 697 (D.C. Cir. 1977).

[1143] Ibid. In that specific case, the plaintiff contested the adequacy of the affidavits filed by the CIA, but the Court of Appeals held that from what was on the record nothing led "to presume bad faith on the part of the CIA." Id., at 698.

[1144] 629 F.2d 144 (D.C. Cir. 1980).

[1145] Id., at 148.

[1146] Ibid.

times challenged the propriety[1147] or legitimacy[1148] of such an approach, deference to agency determinations has always been a prominent feature of FOIA litigation pertaining to classified or otherwise sensitive information[1149].

Even though it is possible to discuss about its extent, some judicial deference is inevitable, for it is inherent in the formulation of Exemption 1. By establishing this exemption, indeed, Congress delegated to the executive branch the authority to pinpoint the general categories of information subject to classification. Therefore, courts may not challenge such rules, standards, and procedures as are established in the executive order on national security classification that is effective at the time of FOIA litigation. A different

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[1147] See SCHULHOFER, *Oversight of national security secrecy in the United States*, supra note 581, at 23 (objecting to the idea that the Executive is the only branch of government possessing "the knowledge and experience necessary to make sound judgments about when to maintain secrecy in national security affairs.") Congress – he continues – has its own expertise in matters concerning the military sphere, and the domains of national security and foreign affairs. The judiciary is the only branch of the Federal Government that lacks significative expertise in such domains, yet courts are definitely skillful at weighing up contrasting interests in openness and confidentiality, since they are called upon to rule on FOIA litigation, as well as on civil and criminal litigation involving classified information, on a regular basis. Therefore, since judges are able to appreciate to the core "the value of both secrecy and transparency," Schulhofer maintains, they should play "an indispensable [role] in a sound system for making information-access decision." Ibid; 27-35. See also *Ray v. Turner*, supra note 1128, at 1194 (noting that the Members of Congress who advocated the version of the 1974 FOIA amendments that was eventually passed "stressed the need for an objective, independent judicial determination [on classified information], and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security.")

[1148] See BARRY SULLIVAN, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 Maryland L. Rev. 1, 69-70 (2012) (arguing that both the idea that the release of records and information is nothing more than the result of an agency's discretionary decision and judicial deference to agency determinations on withholding of information are not "consistent with a proper understanding of FOIA or the constitutional 'right to know.'")

[1149] See AFTERGOOD, *Reducing Government Secrecy*, supra note 14, at 407 (highlighting the high level of deference that is accorded to the executive branch in the fields of national security and foreign affairs by federal courts, which "almost never overturn agency classification decisions.") As to cases decided in the past ten years that have conceded the traditional, deferential approach of the courts in cases concerning classified information see, e.g., *James Madison Project v. CIA*, 605 F. Supp. 2d 99, 109 (D.D.C. 2009); *Miller v. Dep't of Justice*, 562 F. Supp. 2d 82, 101 (D.D.C. 2008) (noting that courts "generally defer to agency expertise in national security matters."); *Makky v. Chertoff*, 489 F.Supp. 2d 421, 441 note 23 (D.N.J. 2007) (finding that a court is generally "not in a position to second-guess agency decisions relating to the segregability of non-exempt information [from such information as may be disclosed] when the information withheld implicates national security concerns.")

conclusion in this regard would undermine the separation of powers the American Republic is based upon. S. 2543 was not the bill that eventually became the FOIA Amendments Act of 1974[1150], and by proposing a new version of Exemption 1, this bill provided for a clause – "standards set out in Executive orders or statutes" – that was later rejected[1151]. The Senate report accompanying the bill, however, contains interesting elucidation of the role of courts, as it makes it clear that courts are supposed to conduct *de novo* review of agency determinations of withholding classified information by applying the standards provided for in the executive order on classification[1152]. Courts – the report states – have to determine, *inter alia*, whether the withheld material relevant to a given FOIA case has been classified "in accordance with the standards set forth in the applicable executive order."[1153] As Deyling has argued, the classification system as a whole "reflects the myriad policy decisions that collectively form the nation's perception of its 'security' interests [, and such] policy choices are not what the courts are empowered to decide in [Exemption 1] cases."[1154]

c. Agency Affidavits

Courts tend to be deferential towards agency affidavits, provided that the affidavits are detailed enough not only to describe the classified material at issue accurately, but also

[1150] See supra note 1128.

[1151] See Note, *National Security and the Amended Freedom of Information Act*, supra note 1129, at 405 note 23. This paper, however, provides an interpretation of the role of courts in Exemption 1 cases that seems to me quite confusing. In particular, I am referring to the following sentence, quite mysterious in its meaning: "The legislative history of the new (b)(1) exemption […] indicates that courts are to apply the statutory standard to the executive order itself and to require merely that the order cover material which would affect national defense or foreign policy in a general way." Id., at 405. According to the paper, the legislative history of the exemption, indeed, is deemed to lead to the conclusion that the role of courts is substantially restricted to determine whether in the executive order governing the classification system, the executive branch has established "classification criteria for information clearly outside the area of national defense or foreign policy." Id., at 404. Such an interpretation of the role of courts in Exemption 1 cases is far too narrow. It underestimates the subsection (b)(1) clause that relates Exemption 1 to matters "in fact properly classified" pursuant to the Executive order on national security classification. The paper itself, indeed, concedes that an interpretation empowering courts to review agency classification decisions both on substantial and procedural aspects "has much to recommend it […]." Ibid.

[1152] See S. Rept. No. 93-854, reprinted in *1975 Source Book*, at 182 ("Congress could leave ultimate classification decisions to the courts, under only a general national defense or foreign policy standard, but the committee prefers to rely on de novo judicial review under standards set out in Executive orders or statutes.")

[1153] Ibid.

[1154] DEYLING, *Judicial Deference and De Novo Review*, supra note 1085, at 89.

to explain why the decision to keep the material secret is sound. The role affidavits play in FOIA cases concerning access to classified information was illustrated by the Court of Appeals for the District of Columbia in a 1980 decision, *Lesar v. Dep't of Justice*[1155], which explained what the Conference Report meant when it directed courts to assign "substantial weight" to agency affidavits. The interpretation of the "substantial weight" requirement given by the Court of Appeals for the District of Columbia identifies the threshold for *in camera* inspection of classified documents, and ends up espousing a theory in favor of judicial deference. If the affidavits are detailed enough to lead to determining that the withheld material reasonably falls within Exemption 1, and if the content of those affidavits "is not challenged by contrary evidence in the record or evidence of agency bad faith," the Court contends, "summary judgment for the Government is appropriate without an *in camera* review of the documents."[1156] In consideration of the expertise the executive branch boasts in national security and foreign affairs, courts tend not to embark on assessments of the risks that the disclosure of classified information entails, for courts themselves acknowledge that such assessments would not be able to replace agency affidavits[1157]. However, courts have made it clear that for agency affidavits to be dependable and thus to entail a deferential approach to FOIA litigation by judges, the affidavits have to describe in detail the content of the classified material at issue, and persuade the court that the decision to subject such material to classification and to keep it as such by denying access to a given FOIA requester proves reasonable[1158].

[1155] 636 F.2d 472 (D.C. Cir. 1980).

[1156] Id., at 481.

[1157] See *Cozen O'Connor v. Dep't of Treasury*, 570 F.Supp. 2d 749, 773 (E.D. Pa. 2008) (holding that judges are not able to envision the possible effects of the disclosure of classified documents instead of agencies, for the former possess "neither the expertise not the qualifications to determine the impact [of disclosure] upon national security or international relations."); *Edmonds v. Dep't of Justice*, 405 F.Supp. 2d 23, 27 (D.D.C. 2005) (quoting *Schlesinger v. CIA*, 591 F.Supp. 60, 67 (D.D.C. 1984)) (tracing out that in FOIA cases pertaining to the domains of national security or foreign affairs, only agencies have the required expertise "to assess the risk of disclosure [of classified documents and information]."); *Center for National Security Studies*, 331 F.3d, supra note 1089, at 927 (pointing out that as far as FOIA litigation is concerned, the D.C. Circuit has "consistently deferred to executive affidavits predicting harm to the national security, and [has] found it unwise to undertake searching judicial review.")

[1158] See *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (observing that in order for an agency withholding decision to be upheld by a court in an Exemption 1 case, "little proof or explanation is required [, provided that there is] a plausible assertion that information is properly classified."); *Am. Civ. Liberties Union v. Dep't of Defense*, 628 F.3d 612, 624 (D.C. Cir. 2011) (quoting *Wolf v. CIA*,

N. Classification of National Security Information

1. Development of a System of Classified Information

The classification system consists of a set of rules and standards, as well as sanctions for their violation[1159], which govern the keeping of secrets in the domains of national security and foreign affairs. Moynihan notes that the system of classification aimed at protecting a good deal of information from public access aroused gradually in the twentieth century as part of the development of the administrative state[1160]. The Moynihan Commission Report argues that to be more precise, the term "government secrecy," meant as referred to the set of provisions and instruments aimed at excluding certain information from public access, should be replaced by "administrative secrecy" or "secrecy by regulation."[1161] A long series of executive orders on classification of national security information that have been issued by the different presidents of the United States since at least the middle of the twentieth century embody such administrative secrecy. In Egan, the Supreme Court stressed that after World War I, the executive branch of the Federal Government gradually created a system of classification of national security information "graded according to sensitivity [of the material protected]."[1162] After World War II, then, the management of such a classification system was entrusted to various civilian agencies within the executive branch, such as the Central Intelligence Agency and the National Security Agency, whose mission consisted in

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473 F.3d 370, 374-375 (D.C. Cir. 2007) ("The CIA's arguments need only to be both 'plausible' and 'logical' to justify the invocation of a FOIA exemption in the national security context."); *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (holding that whenever an agency's affidavits are deemed to prove with "reasonable specificity" that the withheld information falls within the claimed exemption(s) "and evidence in the record does not suggest otherwise, […] the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinion.")

[1159] The explicit provision for sanctions to apply to the violations of rules on the classification of information recalls the definition, elaborated by Shils, of secrecy as "the compulsory withholding of knowledge, reinforced by the prospect of sanctions for disclosure." EDWARD A. SHILS, *The Torment of Secrecy. The Background and Consequences of American Security Policies*, 26 (Glencoe, Illinois: The Free Press, 1956).

[1160] See MOYNIHAN, *Secrecy*, supra note 15, at 59 (contending that secrecy in the United States turns out to be "an institution of the administrative state that developed during the [two] great conflicts of the twentieth century.")

[1161] Moynihan Commission Report, at 5.

[1162] *Egan*, 484 U.S., supra note 43, at 527 (referring to Note, *Developments in the Law – The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1193-1194 (1972)).

the gathering of intelligence information or in any event pertained to national security[1163]. At the same time, presidents began to issue specific executive orders whereby they laid down rules and standards for the classification of information concerning national security and foreign affairs, and delegated the authority to classify information to the heads of the agencies mentioned above[1164], as well as to other high-ranking officials and members of the Cabinet.

Since 1940, each President has issued one or more executive orders to establish rules, standards, and procedures on classification of information pertaining to the domains of national security and foreign affairs[1165]. By amending the National Security Act of 1947, section 802(a) of the Intelligence Authorization Act for Fiscal Year 1995[1166] expressly conceded that the President of the United States has authority to "establish procedures to govern access to classified information," and all departments and agencies have to comply with such procedures[1167]. As Kosar has observed, such a provision "made into law what had hitherto been a practice – allowing the President to have a lead role in devising classified information policy."[1168] All executive orders on classification address the same issues, i.e., such issues as are essential to a system of classified information. Those issues may be turned into the following questions: Who has authority to classify information and documents within the executive branch? What are the levels of classification and the corresponding markings that may be applied to information? What do such levels consist of – and thus what degree of danger to the country do they imply? Who is authorized to gain access to classified information within the executive branch? How long is classified information required to remain classified? Executive orders on classification usually repeat a sort of stock phrase that forbids agencies from exercising their authority to classify information just to cover up mistakes or wrongdoing[1169]. By inserting such a phrase, Presidents prove that they are fully

[1163] Id., at 527-528.

[1164] Id., at 528.

[1165] For a list of all executive orders on classified information issued over the years, see KEVIN K. KOSAR, *Classified Information Policy and Executive Order 13526*, CRS Report for Congress (December 10, 2010), p. 3.

[1166] Pub. L. 103-359, 108 Stat. 3435 (October 14, 1994).

[1167] This provision was originally codified at section 435 of title 50, U.S. Code, while now constitutes 50 U.S.C. § 3061(a).

[1168] KOSAR, *Classified Information Policy and Executive Order 13526*, supra note 1165, at 5.

[1169] See Executive Order 13292 (March 28, 2003 – President George W. Bush), 68 Fed. Reg. 15315 (March 28, 2003). Section 1.7 provides that under no circumstances may information be classified for the following purposes: "(1) [to] conceal violations of law, inefficiency, or administrative error;

aware of the possible misuse of government secrecy, a concept that – as noted above – has its core in the very classification system. Congress specifically addressed the so-called over-classification, a term that refers to all situations in which executive branch secrecy appears to be excessive and thus unnecessary, by enacting the Reducing Over-Classification Act of 2010[1170]. Each new executive order on classification repeals the one issued by the former President[1171].

2. The Present Regulation of Classified Information Pertaining to National Security: Executive Order 13526 of 2009

a. Classification Levels and Types of Information That May Be Classified

Currently, Executive Order 13526, issued by President Obama in late December 2009,[1172] lays down rules, standards, and procedures for the classification of sensitive information concerning the fields of national security and foreign affairs. Section 1.2(a) E.O. maintains the three traditional classification levels – "Top Secret," "Secret," and "Confidential." The executive order, therefore, does not provide for anything new in this regard. "Top Secret" is the classification level that implies the highest potential threat to the country, and original classifiers may apply it to information, "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security [of the United States]."[1173] The minimum classification level is "Confidential," and

(2) [to] prevent embarrassment to a person, organization, or agency; (3) [to] restrain competition; or (4) [to] prevent or delay the release of information that does not require protection in the interest of the national security." An identical provision was found in one of the executive orders issued by President Clinton on classification between 1994 and 1995 – Executive Order 12958, issued on April 17, 1995 (section 1.8), and in Executive Order 12356 of 1982, issued by President Reagan.

[1170] The Senate report accompanying the House of Representatives bill that was eventually signed into law explained that the purpose of the act is to "prevent federal departments and agencies from unnecessarily classifying information or classifying information at a higher and more restricted level than is warranted." S. Rept. 111-200, 111th Cong., 2nd Sess. (May 27, 2010), p. 1. By doing so – the report continues – the act should "promote information sharing across departments and agencies and with State, local, tribal and private sector counterparts, as appropriate." Ibid.

[1171] But see KOSAR, *Classified Information Policy and Executive Order 13526*, supra note 1165, at 4 (noting that an executive order issued by President Truman on February 1, 1950, Executive Order 10104, 15 F.R. 597 (February 3, 1950), the purpose of which was to protect from public access information concerning military and naval installations deemed to be vital to the country, has never been repealed expressly and thus is still effective, at least formally).

[1172] Executive Order 13526 ("Classified National Security Information"), supra note 94.

[1173] Section 1.2(a)(1), E.O. 13526.

just requires that the release of information could bring damage to national security, while the intermediate level – the "Secret" level – refers to "serious damage."[1174] It is evident that only original classification authorities, by exercising a discretionary power based on their expertise in the fields of national security and foreign affairs, may gauge the degree of damage the disclosure of certain information is capable of bringing about. That original classifiers are assigned discretion in determining what information is to be stamped as classified is corroborated by regulations on classifications published in 2010 in the CFR and in the Federal Register[1175]. Section 2001.10 of title 32, CFR, indeed, specifies that an original classification authority does not have to prepare a written statement that describes the damage to national security to justify the classification of information at the time in which the classification decision is made. However, such authority is supposed to sustain in writing its classification decision whenever this decision is challenged. Since there is no trace of any standard or requirement concerning the reasons the authority may set forth to justify its classification decision, the provision suggests that the assessment of the potential threat to the United States posed by disclosure of the information is totally entrusted to the discretion of the authority. However, a discretionary classification decision may be incorrect or become outdated due to evolution of events. The guidance that each agency follows in adopting its classification decisions needs periodic updating, as well. Accordingly, section 1.9 E.O. prescribes that the heads of agencies conduct a comprehensive review of classification guidance "on a periodic basis." It is made clear that the review must target not only the guides that agencies issue to establish policies and detail regulation on classification, but also individual classification decisions to verify whether they are still in accordance with the required standards[1176].

Section 1.4 E.O. enumerates the types of information that may be subject to classification markings. As the case with classification levels, the executive order did not bring in any significant novelty in this regard. The types of information identified, indeed, are nothing else than mere specification of the two sectors that constitute the scope of any executive order on classified information issued over time – national defense and foreign

[1174] Section 1.2(a)(2), E.O. 13526.

[1175] See "Classified National Security Information; Final Rule," 32 CFR 2001, 75 Fed. Reg. 37254 (June 28, 2010).

[1176] Section 1.9(a),(b), E.O. 13526.

relations of the United States. Covert action is mentioned, as well,[1177] and this fact is interesting because Executive Order 13292, issued by President Bush in 2003, for instance, failed to mention explicitly covert action, and just made a generic reference to "special activities," which were included in the broader category of "intelligence activities."[1178] As I sought to underscore above, however, it has been long conceded that threats that directly imply the military defense of the country and other activities that fall within the concept of national defense, such as intelligence activities, do not exhaust the scope of national security. That the concept of national security the executive order contemplates extends beyond the purely military domain may be inferred from subsection (e), which is concerned with such "scientific, technological, or economic matters" as bear on national security. Furthermore, subsection (g) includes among the types of information that may be classified the information that pertains to "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security [of the United States]." Such a wide formulation appears to entail some sort of overlapping between the concepts of national security and homeland security. It is not clear, indeed, what is the line of demarcation between the category of critical infrastructure, which falls within the scope of homeland security, and that of infrastructures related to national security, which subsection (g) mentions. Section 1.7, instead, repeats the provision, already pointed out above, against the usage of classification to conceal mistakes or wrongdoing or just to keep a greater amount of secrecy than is strictly necessary. Subsection (c) establishes conditions on which information already declassified and thus made available to the public may be subject to a classification marking again. Subsection (d) provides that a request for access to information filed pursuant to the FOIA, the Presidential Records Act, or the Privacy Act of 1974[1179] afford a classification authority the chance to classify or reclassify the requested information. Furthermore, section 1.8 contemplates the case in which persons that lawfully handle classified information challenge the classification level assigned to certain information by claiming that such a level is improper[1180]. The classification level of information may be impugned in conformity with specific procedures agencies have to lay

[1177] Subsection (c) expressly includes covert action in the "intelligence activities" that fall within the scope of the executive order.

[1178] Section 1.4(c), E.O. 13292, supra note 1153.

[1179] Pub. L. 93-579, 88 Stat. 1896 (December 31, 1974), codified at 5 U.S.C. 552a.

[1180] See KOSAR, *Classified Information Policy and Executive Order 13526*, supra note 1165, at 12 (observing that "for example, if two agencies classified the same piece of information at different levels [of classification], each agency may contest the other's classification marking.")

down[1181]. Moreover, classification may be concerned with only some portions of a document. Section 2001.21(c) of CFR regulations requires that the classification authority mark each portion of a document "to indicate which portions are classified and which portions are unclassified by placing a parenthetical symbol immediately preceding the portion to which it applies."

b. Original Classification Authority and Derivative Classification Authority

Section 1.3 E.O. assigns original classification authority to the President of the United States, the Vice President, agency heads and officials designated by the President, and any other U.S. government official delegated by a person having original classification authority[1182]. Under subsection (c)(2), only the President, the Vice President, or an agency head or official designated by the President may delegate "Top Secret" original classification authority. Furthermore, subsection (c)(4) specifies that delegations of original classification authority must always be in writing, and, as a general rule, may not be in turn delegated to another official. Paragraph (5) adds that such delegations have to be communicated to the Director of the Information Security Oversight Office. The act of delegation has to identify the official by name or position. Subsection (d) requires that all original classification authorities receive training concerning classification, over-classification – which is conceived of as a pathological phenomenon to avoid and thus classifiers are trained to consider it as such – and declassification at least once a calendar year. By issuing an order

[1181] Under section 1.8(b), such procedures must ensure that the person challenging a classification decision not be punished, that an impartial official or panel conduct an impartial review of the classification decision at issue, and that those who bring action against a classification decision be apprised of their right to appeal the decision to the Interagency Security Classification Appeals Panel (ISCAP). Section 2001.14(b) of CFR regulations requires that agencies adopt a system for processing and tracking classification challenges, and take them into consideration separately from any FOIA request or other access request that agencies may have received. An agency has to respond in writing to a classification challenge within 60 days or within the date the agency identifies. If no response is provided within 120 days, the challenger is entitled to turn to the ISCAP. Section 2001.14(c) states that regardless of these provisions governing the filing of formal classification challenges, the status of certain classified information may be challenged informally. It is added that "informal inquiries should be encouraged as a means of holding down the number of formal challenges and to ensure the integrity of the classification process."

[1182] Subsection (c)(1) specifies that delegations of original classification authority must be kept to the minimum required to ensure implementation of the executive order.

attached to E.O. 13526[1183], President Obama established a list of officials, designated as original classifiers with authority to mark information as "Top Secret" or "Secret." Among the officials and members of the Cabinet to whom the original classification authority to apply "Top Secret" marking is granted by the President are the Assistant to the President for National Security Affairs, also known as the National Security Advisor, the Assistant to the President for Homeland Security and Counterterrorism, the Secretary of State, of Defense, and of Homeland Security, the Director of National Intelligence. Another lead of the tendency of the scope of national security and homeland security to overlapping, therefore, can be detected in the authority assigned to the Secretary of Homeland Security to classify information as "Top Secret." Since this marking applies to situations in which the unauthorized disclosure of the information at issue is reasonably deemed capable to cause exceptionally grave damage to national security, the Secretary may deal with such information, which refers to the core of national security. However, the Secretary is also the head of the Department of Homeland Security. Accordingly, since classified information pertains to national security, and the Secretary of Homeland Security may determine that certain information is subject to the highest classification level, the Department of Homeland Security handles classified information and thus addresses national security issues. Section 1.6 pinpoints a series of data to attach to information that is originally classified, such as the name and position of the original classifiers, and the duration of classification.

Unlike original classification authority, derivative classification authority consists in reproduction or usage of originally classified information to create new classified material. Even though such material is indeed new, it is based upon information that already has a classification marking applied by an original classifier. Part 2 of the executive order is devoted to derivative classification[1184]. Persons enjoying original classification authority may employ material they have classified to produce further classified material, but executive branch officials other than original classifiers usually engage in derivative classification. Section 2.1(b) requires that derivative classification authorities be identified by name and position within a given department or agency, "observe and respect original

[1183] PRESIDENT BARACK H. OBAMA, Order of December 29, 2009 ("Original Classification Authority"), 75 Fed. Reg. 735 (January 5, 2010).

[1184] Section 2.1(a) defines derivative classifiers as "[p]ersons who reproduce, extract, or summarize classified information, or who apply classification markings derived from source material or as directed by a classification guide […]."

classification decisions,"[1185] and – accordingly – maintain the classification markings that pertain to the originally classified material they handle and use to create additional classified information[1186]. Subsection (d) provides that like original classifiers, derivative classifiers must go through proper training, which has to occur at least once every two years.

c. Declassification

Section 1.5 E.O. provides that information may not be subject to classification indefinitely, and when certain information is classified, it must be identified the moment in which the classification status will cease. Subsection (a), indeed, requires that when applying a classification marking, an original classifier "establish a specific date or event for declassification based on the duration of the national security sensitivity of the information." Upon reaching the date or event, the information shall be automatically declassified. Subsection (b) establishes ten years from the date of the original classification as the ordinary – and residual – duration of classification, which applies whenever the original classification authority cannot identify a specific date or event for declassification. Once the ten-year period has elapsed, information will be declassified. The original classification authority, however, may extend the duration of classification up to 25 years from the date of the original decision if the authority deems it proper "[for] the sensitivity of the information […]." Subsection (a), however, exempts both from the ordinary duration of classification and from the 25-year limit "information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key

[1185] Section 2.1(a)(2). Section 2001.22(d) of CFR regulations specifies that the reason for original classification of the material that derivative classifiers use be not reproduced in derivative classification.

[1186] Section 2001.21(b) of CFR regulations provides that the highest level of classification of an originally classified document is determined by considering the highest level of classification that is assigned to any single portion within the document, and has to be marked "in a way that will distinguish it clearly from the informational text." As paragraph (2) specifies, when a document contains information that is subject to different levels of classification, the highest level of classification that is found in the document is the overall classification marking of the document. Paragraph (2) explains this rule by providing an example of how such a mechanism works in practice: If some information within a given document is marked "Secret" and other information contained in the same document possesses instead the "Confidential" level of classification, the overall marking of the document will be "Secret." Section 2001.22(f) directs derivative classifiers to stick to the rules provided for in section 2001.21(b) in identifying the highest level of classification of the documents they classify.

design concepts of weapons of mass destruction […].” Such information, therefore, may exceed the duration of classification as established in subsection (b).

Declassification is a process by which classified information loses its classification status and thus becomes of public domain[1187]. Part 3 of the executive order deals with declassification and downgrading of classified information. Original classification authorities are usually engaged in declassification[1188], which may be the consequence of an assessment on persistence of the reasons for original classification. In such a case, declassification ensues from a determination that excludes the persistent soundness of those reasons. The result of the assessment, however, may also be the opposite, and thus the original classification authority may conclude its review by finding that certain information is to be exempted from declassification either in whole or in part. Furthermore, declassification may be triggered by formal classification challenges, as well as by FOIA requests[1189]. Both situations, indeed, provide an original classification authority with a chance to review the classification status of certain information.

Section 3.3 E.O. provides for an automatic declassification mechanism, which applies to “all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, […] whether or not the records have been reviewed.”[1190] Subsection (b), however, enumerates nine exemptions to automatic declassification, the scope of which is concerned with diverse aspects of the national defense and foreign relations of the United States[1191]. Other provisions result in further limiting the application of automatic declassification. Subsection (f), for instance, empowers the Secretary of State to determine when negotiations of the

[1187] Section 1.6(h) specifies that each declassified piece of information must be marked as such, i.e., as declassified, before being made available to the general public.

[1188] Section 3.1(b) identifies the persons who are authorized to declassify or downgrade classified information. Such persons are – first of all – those who applied the original classification marking to the information at issue, also referred to in the executive order as “the originator[s],” if they still possess original classification authority, or the successors in function, if the original classifiers do not hold the position anymore. Secondly, a supervisory official of either the originators or their successors may declassify information.

[1189] See KOSAR, *Classified Information Policy and Executive Order 13526*, supra note 1165, at 14 and note 43.

[1190] Section 3.3(a).

[1191] Since all those exemptions are aimed at responding to the need to protect the national security of the United States, and thus their legal basis is Exemption 1 of the FOIA, the fact that the number of exemptions to automatic declassification equates to the number of FOIA exemptions appears to be nothing more than a mere coincidence.

United States with a foreign government or an international organization involve information that must remain classified for a period longer than 25 years from the date of its creation. The authority to determine when the exemptions to automatic declassification apply is vested in the Interagency Security Classification Appeals Panel. In particular, subsection (j) requires that one year before certain information is subject to automatic declassification, each agency notify the Director of the Information Security Oversight Office of any specific information that the agency intends to exempt from automatic declassification. The notification must set out the reasons that, according to the agency, justify application of a given exemption. The decision made by the Interagency Security Classification Appeals Panel may be appealed to the National Security Advisor and thus to the President of the United States.

The executive order also provides for declassification review processes. Under section 3.4, agencies have to engage in systematic declassification review of records that have been exempted from automatic declassification. Section 3.5, instead, provides for a mandatory declassification review process, which is triggered by a request for declassification. Such a request, which must be detailed enough to enable the agency to pinpoint the document(s) containing the sought information, may be filed by any person, and it is responsibility of the original classification authority to conduct the review. The request may not be processed if it pertains either to an operational file exempted from disclosure pursuant to the FOIA or to information involved in pending litigation[1192]. In addition, subsection (b) exempts from mandatory declassification review the information created by the incumbent President or Vice President of the United States or by their respective staff members, and the information created by committees, commissions, or boards appointed by the incumbent President, or by other entities within the Executive Office of the President whose sole function is to advise and assist the President[1193]. Declassification review of certain types of highly sensitive information is subject to special procedures, which the competent authority has to lay down. The Secretary of Defense and the Director of National Intelligence, for instance, are required to establish special procedures – respectively – for the

[1192] Section 3.5(a)(2),(3).

[1193] Under subsection (g), documents that must be submitted "for prepublication review or other administrative process pursuant to an approved nondisclosure agreement" are outside the scope of mandatory declassification review, as well.

review of cryptologic information, and for the review of information concerning intelligence sources, methods, and activities[1194].

3. The Department of Homeland Security and Classified Information

State and local authorities, as well as the private sector, need to gain access to classified information in order for them to have a role in homeland security, and such access is subject to specific regulation. The Department of Homeland Security Strategic Plan for Fiscal Years (FY) 2012-2016 underscored that the fulfilment of the missions the DHS is entrusted with requires cooperation not only with public authorities at different government levels, but also with individuals, communities of people, and businesses[1195] – briefly, what in Europe is often referred to as the whole civilian society. All these subjects participate in the so-called homeland security enterprise[1196], within which the DHS has to ensure a high level not only of sharing but also of protection of information[1197]. Participants in the homeland security enterprise are usually referred to in executive branch documents as state, local, tribal, and private sector (SLTPS) entities. As noted above, they need to gain access to classified information handled by the DHS in order for them to participate effectively in activities pertaining to homeland security. Executive order 13549, issued by President Obama on August 18, 2010,[1198] is aimed at governing access to such information, and thus at identifying the amount of sensitive information that may flow from the Federal Executive to SLTPS entities. The program the executive order sets forth ensures that "security standards governing access to and safeguarding of classified material" be applied in

[1194] Section 3.5(f).

[1195] Cooperation between public entities and between them and the private sector in a broad sense is deemed to be crucial "to the Department [of Homeland Security]'s success in carrying out its core missions and operational objectives." DEP'T OF HOMELAND SECURITY, *Department of Homeland Security Strategic Plan for Fiscal Years (FY) 2012-2016* (February 2012), p. 23.

[1196] The 2010 Quadrennial Homeland Security Review defined the homeland security enterprise (HSE) as the "collective efforts and shared responsibilities of federal, state, local, tribal, territorial, nongovernmental, and private-sector partners – as well as individuals, families, and communities – to maintain critical homeland security capabilities." DEP'T OF HOMELAND SECURITY, *2010 Quadrennial Homeland Security Review* (February 2010), p. 12.

[1197] See DEP'T OF HOMELAND SECURITY, *Information Sharing and Safeguarding Strategy* (January 2013), p. 8 (stating that one of the principles the DHS has to take into account is that "[i]nformation sharing and safeguarding are force multipliers that enable the HSE to achieve its mission objectives faster and at reduced risk and cost.")

[1198] "Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities," 75 Fed. Reg. 51609 (August 23, 2010).

accordance with the general executive order on classification in the national security domain[1199]. The Secretary of Homeland Security is required to issue a directive to lay down procedures and standards for implementation of such security standards by SLTPS entities. The Secretary issued the directive in February 2012. The express purpose of the directive is to "instill uniformity and consistency in the application of the security standards" mentioned above whenever SLTPS entities need to gain access to classified information[1200].

The Reducing Over-Classification Act, signed into law on October 7, 2010,[1201] addressed access by SLTPS entities to classified information held by the executive branch of the Federal Government. The act is aimed not only at preventing the over-classification of sensitive information pertaining to homeland security, but also at promoting the sharing of information – whether or not it is classified – within all subjects involved in the homeland security enterprise. The findings of the act underline that the over-classification of information results in hindering the flow of classified information within the Federal Government and with the other components of the homeland security enterprise. Over-classification, indeed – it is observed – makes it harder to pinpoint such information as the Federal Executive is allowed to disclose to foster cooperation in the achievement of DHS missions, and what subjects should that information be shared with[1202]. By amending the Homeland Security Act of 2002, the Reducing Over-Classification Act provided for the establishment of a new authority within the DHS – the Classified Information Advisory Officer (CIAO), who is designated by the Secretary of Homeland Security. Under section 124m(b) of title 6, U.S. Code, the CIAO is responsible – *inter alia* – for the administration of training programs meant to assist SLTPS entities "in developing plans and policies to respond to requests [of access to classified information]."[1203] By devising and managing such programs, therefore, the Federal Executive provides personnel employed at different government levels and subjects of the private sector with instructions on disclosure of the classified information that has been shared with them. A general rule in the U.S. legal system

[1199] Section 1.2, E.O. 13549.

[1200] DEP'T OF HOMELAND SECURITY, *Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities – Implementing Directive* (February 2012), p. 5.

[1201] Pub. L. No. 111-258, 124 Stat. 2648 (October 7, 2010), codified in part at 6 U.S.C. § 124m.

[1202] See 6 U.S.C. § 124m note, Findings (3) ("Over-classification of information causes considerable confusion regarding what information may be shared with whom, and negatively affects the dissemination of information within the Federal Government and with State, local, and tribal entities, and with the private sector.")

[1203] 6 U.S.C. § 124m(b)(1)(A).

requires that access to such information be restricted to those who possess appropriate security clearances. Accordingly, the training programs administered by the CIAO have also to instruct SLTPS personnel "on the means by which such personnel may apply for security clearances."[1204] Furthermore, section 6(b) of the Reducing Over-Classification Act, codified at section 3061 note of title 50, U.S. Code, provides for a twofold evaluation of classification policies and rules that the inspector general of each department or agency with original classification authority has to conduct[1205]. Firstly, the offices of inspector general (OIGs) are required to assess policies and rules on classification adopted by their department or agency, as well as the implementation of such policies and rules, i.e., procedures followed, classification markings applied, tools and techniques used for the classification of electronic documents and for declassification, et cetera. Secondly, the OIGs have to detect in detail such rules, procedures, and practices of the department or agency under scrutiny as are deemed to "be contributing to persistent misclassification of material […]."[1206]

The Homeland Security Act of 2002 established the OIG for the Department of Homeland Security by amending the Inspector General Act of 1978[1207], codified at 5 U.S.C. Appendix[1208]. The original version of the Inspector General Act of 1978 did not devise the office of inspector general as a structure to apply to the whole executive branch. Section 2 of the act, indeed, defined offices of inspector general as "independent and objective units" that were established only within twelve departments and agencies of the Federal Executive[1209]. The number of such offices has increased over time. Section 2 of the current

[1204] Section 124m(b)(1)(C).

[1205] It is specified that in performing the evaluation, the inspectors general may rely on the assistance of the Information Security Oversight Office (ISOO). The ISOO is a component of the National Archives and Records Administration, and exercises management and oversight functions over the comprehensive system of classified information on the basis of guidance it receives from the National Security Council.

[1206] 50 U.S.C. § 3061 note – section 6(b)(1)(A), Reducing Over-Classification Act.

[1207] Pub. L. No. 95-452, 92 Stat. 1101 (October 12, 1978).

[1208] The Appendix of title 5, U.S. Code, also contains the codification of the Federal Advisory Committee Act (see infra), and of the Ethics in Government Act of 1978. In addition, the Appendix includes a long series of reorganization plans issued by different presidents of the United States over the years. The main purpose of such plans is to establish new agencies within the executive branch of the Federal Government, and to assign them administrative functions.

[1209] The federal entities that the original version of the Inspector General Act of 1978 endowed with an OIG were the following: the Department of Agriculture; the Department of Commerce; the Department of Housing and Urban Development; the Department of the Interior; the Department of Labor; the Deparmtent of Transportation; the Community Services Administration; the

version of the act, as codified, identifies three main functions of OIGs: to conduct audits and investigations concerning programs and operations the departments and agencies with a OIG carry out; to ensure coordination and recommend the adoption of policies aimed at improving economy, efficiency, and effectiveness, as well as at preventing fraud and abuses, in the administration of such programs and operations; to acquaint the head of the department or agency a given OIG is based in and Congress on a regular basis with "problems and deficiencies relating to the administration of such programs and operations and [with] the necessity for and progress of corrective action."[1210] The Inspector General Reform Act of 2008 brought in significant amendments to the act[1211]. Of great interest is, however, above all section 8I of 5 U.S.C. App., which lays down special provisions concerning the OIG at the Department of Homeland Security. This OIG may need access to sensitive information concerning one of the six matters enumerated in subsection (a)(1) when the OIG itself is conducting audits and investigations, or it may issue a subpoena to obtain the release of such information. The matters enumerated pertain mainly to intelligence and national security in general, and to law enforcement proceedings, and thus recall – essentially – exemptions 1 and 7 of the FOIA. Paragraph (1) requires that the Secretary of Homeland Security specifically authorize the access to information on these matters by the OIG. Paragraph 2 empowers the Secretary to enjoin the OIG from carrying out an audit or investigation or from issuing a subpoena, if the Secretary determines that such bar from taking action is necessary to keep information on the matters mentioned above secret, to preserve national security, or "to prevent a significant impairment to the interests of the United States." Subsection (b), however, clarifies that the authority vested in the Secretary of Homeland Security may not be invoked to restrict access to information on such matters by Congress.

Environmental Protection Agency; the General Services Administration; the National Aeronautics and Space Administration; the Small Business Administration; the Veterans' Administration.

[1210] 5 U.S.C. App. – Section 2(3), Inspector General Act of 1978.

[1211] One of the stated purposes of the act was to increase the OIGs' independence from the governing bodies of the departments and agencies in which they are based. Furthermore, the Inspector General Reform Act of 2008 established a new entity – the Council of the Inspectors General on Integrity and Efficiency (CIGIE) – by redesigning sections 11 and 12 of the Inspector General Act of 1978 as sections 12 and 13, and by adding a new section 11. Structured as an entity enjoying independence within the Federal Executive, the CIGIE has a twofold mission. In addition to providing for the improvement of economy, efficiency, and effectiveness of administrative business, the CIGIE has to ensure that executive branch personnel feature a high level of professionalism.

In August 2013, the OIG of the Department of Homeland Security issued a report on classification policies, rules, and procedures followed by the Department[1212]. The OIG specifically directed its review at activities carried out by the Office of the Chief Security Officer (OSCO) and by the components of the DHS having original classification authority[1213]. The OIG points out that by releasing the report, the obligation to conduct the twofold evaluation provided for in section 3061 note of title 50, U.S. Code, is fulfilled. Indeed, not only does the report appraise the DHS's policies, rules, and procedures on classification; it also sifts them to detect what proves improper or misleading in the classification process considered as a whole[1214]. The report finds that classification policies, rules, and procedures followed by the DHS are consistent with federal regulation. The OSCO and DHS components with original classification authority have successfully implemented and managed the security program referred to in Executive Order 13526[1215], and – more generally – have complied with federal prescriptions and standards concerning the classification of information[1216]. Since – as the report notes – "[o]riginal classification precedes all other aspects of the security classification system,"[1217] the positive performance of the DHS as to original classification constitutes the achievement of an important goal. The report, however, also concedes that the impact of original classification ascribable to authorities within the DHS on the entire system turns out to be marginal, for just a few

[1212] OFFICE OF INSPECTOR GENERAL – DEP'T OF HOMELAND SECURITY, *Reducing Over-Classification of National Security Information* (August 2013).

[1213] The report contains a list of DHS components empowered to originally classify information. Such components are the following: the Domestic Nuclear Detection Office; the Federal Emergency Management Agency; the Federal Law Enforcement Training Center; the National Protection and Programs Directorate; the Office of Inspector General; the Office of Intelligence and Analysis; the Science and Technology Directorate; the Transportation Security Administration; the U.S. Citizenship and Immigration Services; the U.S. Coast Guard; the U.S. Customs and Border Protection; the U.S. Immigration and Customs Enforcement; the United States Secret Service. Id., at 4.

[1214] Id., at 5; Appendix A, id., at 23.

[1215] Id., at 9 (contending that "DHS' commitment to ensuring that the security program is implemented effectively as established under [Executive Order 13526] is evident throughout the Department's components and offices.")

[1216] Other than Executive Order 13526, the relevant federal regulation includes the Reducing Over-Classification Act as codified, the 2010 regulations on classifications published in CFR (see supra note 1087), and a 2009 directive that pertains to classification markings and applies to the Intelligence Community – Intelligence Community Directive (ICD) Number 710, *Classification and Control Markings System* (September 2009).

[1217] *Reducing Over-Classification of National Security Information*, supra note 1212, at 3.

original classification authorities of the DHS have taken the initiative to classify documents for the first time[1218]. As far as the second aspect of the assessment entrusted to the OIG is concerned, the report suggests deploying a new classification management tool[1219]. According to the results of the review, even though only a relatively small number of the scrutinized documents contains "declassification, sourcing, and marking errors,"[1220] all classification management tools have been deemed outdated. Since such tools are essential to classifying electronic documents, a poor status of update processes[1221] brings about an increase in marking and declassification errors. The new management tool of which the report recommends the adoption is regarded as capable to "reduce errors in classification and declassification and eliminate some current marking issues."[1222]

III. Other Sunshine Laws

A. The Federal Advisory Committee Act (FACA)

1. The Purposes and Main Contents of the FACA

In the 1970s, Congress passed two statutes that are usually grouped as open meeting legislation. The Federal Advisory Committee Act [hereinafter – FACA] was enacted in 1972[1223], while the Government in the Sunshine Act [hereinafter – GITSA] was passed in 1976[1224]. Congress enacted these statutes in a period in which such events as the Watergate scandal and the Vietnam War generated widespread disaffection towards the U.S. Government[1225]. In an attempt to fight such disaffection, the two statutes increased the level

[1218] Id., at 14 (observing that "[m]ost DHS components and offices are consumers of intelligence information and rarely have to make original classification decisions.")

[1219] Id., at 9 (noting that the utility a classification management tool provides consists in "allow[ing] users to automatically apply classification markings to electronic documents.")

[1220] Id., at 5.

[1221] Id., at 9 (pointing out that at the time the report is issued, DHS components using a classification management tool – according to the review, not all of them employ one – have not brought it up to date to implement the rules and standards established in Executive Order 13526, the executive order on national security information).

[1222] Ibid.

[1223] Pub. L. No. 92-463, 86 Stat. 770 (October 6, 1972), codified at 5 U.S.C. App. (Appendix) §§ 1-16.

[1224] Pub. L. No. 94-409, 90 Stat. 1241 (September 13, 1976), codified at 5 U.S.C. 552b.

[1225] See REEVE T. BULL, *The Government in the Sunshine Act in the 21st Century – Final Sunshine Act Report* (March 10, 2014), p. 2 (arguing that in the period beginning in the second half of the

of transparency and accountability of the Federal Government, and especially of its executive branch.

As a 2011 report containing recommendations set out by the Administrative Conference of the United States[1226] noted, the FACA "governs the process whereby the President or an administrative agency obtains advice from groups that include one or more non-federal employees."[1227] By enacting the FACA, Congress intended to put a curb on the executive branch long-standing practice of establishing public-private advisory committees, and thus on the ability of the executive branch to seek advice from the private sector. Congress, however, recognized the importance of such interaction between public and private sectors as advisory committees realize[1228]. In the findings and purposes of the FACA,

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1960s and concluding in the first half of the next decade, "the Watergate scandal, the Vietnam War, and other high profile events […] eroded the confidence of the American public in the good faith of their elected leaders […].")

[1226] The Administrative Conference of the United States (ACUS) is an independent federal agency, which also includes members from the private sector. The ACUS was established by the Administrative Conference Act of 1964, Pub. L. 88-499, 78 Stat. 615 (August 30, 1964), codified at 5 U.S.C. §§ 591 et seqq., and began to work in 1968. Section 591 identifies the following purposes of the subchapter of title 5, U.S. Code, devoted to the ACUS: to provide arrangements that may facilitate the study of mutual problems, the exchange of information, and the development of recommendations by federal agencies; to promote public participation and efficiency in the rulemaking process; to reduce the amount of litigation in the regulatory process; to improve the use of science in the regulatory process; to improve the effectiveness of laws applicable to the regulatory process. For the achievement of these purposes, section 594 establishes the powers of the ACUS, among which are the power to analyze the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to federal agencies, as well as to the President and to Congress, and the power to ensure "interchange among administrative agencies of information potentially useful in improving administrative procedure."

[1227] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *The Federal Advisory Committee Act. Issues and Proposed Legislation, Proposed Recommendation* (December 8-9, 2011), p. 1.

[1228] See House Committee On Government Operations, *The Role and Effectiveness Of Federal Advisory Committees*, H.R. Rep. No. 91-1731, 91st, Cong., 2nd Sess. (1970), reprinted in *Federal Advisory Committee Act (Pub.L. 92-463) Source Book: Legislative History, Texts, and other Documents*, Subcommittee on Energy, Nuclear Proliferation, and Senate 95th Cong., 2d Sess. (July 1978) (Washington, D.C., Gov't. Print. Off., 1978) [hereinafter – *1978 FACA Source Book*], p. 217 (observing that federal advisory committees "provide […] a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost.") This is an entrenched conviction of Congress. As early as 1957, the House of Representatives prepared a report in which it underlined the same principle: Establishment of advisory committees enables the Government – namely, the executive branch – to rely "at little or no cost [upon] the best technical brains and experience of all fields of

it is specified that to cape with the tendency to increase in the number of advisory committees, the executive branch be instructed to establish such committees only when it deems them to be necessary, so that "their number […] be kept to the minimum necessary."[1229]

One of the main purposes of the FACA is to promote the transparency of federal advisory committees and of their activities. As Bull has maintained, the FACA lays down "transparency requirements to ensure that committees operate publicly and that everyday citizens have the opportunity to express their views to committee members."[1230] Section 10(a)(1) of the Appendix of title 5, U.S. Code, applies a principle of publicity to each advisory committee meeting, which indeed "shall be open to the public." The public, therefore, is granted a right to attend federal advisory committee meetings. Such a right is made effective by requiring that "timely notice" of each meeting be published in the Federal Register, unless the U.S. President determines that giving notice of a certain meeting is improper "for reasons of national security […]."[1231] Section 10(a)(3) substantiates the participation of the public by allowing interested persons not only to attend and appear before advisory committees, but also to express their views by filing statements. Furthermore, section 10(b) prescribes that advisory committee records be made available to any person. Subsection (c), instead, requires that advisory committees keep "[d]etailed minutes of each meeting," which have not only to mention every person present at a given meeting, but also to provide an accurate, complete account of matters discussed and conclusions reached. The minutes must also contain "copies of all reports received, issued, or approved by the advisory committee [during that meeting]."

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business, industrial, or professional endeavor." H.R. Rep. No. 85-576, 85th Cong., 1st Sess. (June 17, 1957), reprinted in *1978 FACA Source Book*, at 47. The report, however, also criticized the secrecy that featured advisory committees and the business they carried out. In consideration of "the veil of secrecy which now surrounds the activities of these groups," the report contended, "it is possible and entirely probable that some of them are established not for the primary purpose of giving advice." Id., at 48.

[1229] 5 U.S.C. App. § 2(b)(2).

[1230] REEVE T. BULL, *The Federal Advisory Committee Act: Issues and Proposed Reforms, Draft Report for Committee Review* (September 12, 2011), p. 4.

[1231] 5 U.S.C. App. § 10(a)(2).

2. The FACA Regulations Adopted By the GSA in 2001

Since 1977, when Executive Order 12024[1232], issued by President Carter, entrusted the General Services Administration (GSA) with an oversight function over the FACA, the GSA has administered the act and has been empowered to adopt relevant regulations. Interesting to note is that the GSA appears to oppose the common opinion that includes the FACA in the category of open meeting legislation, and considers the act as capable of favoring participation and transparency in the public sector. In 2001, indeed, the GSA stated that according to the FACA, "the only purpose of Federal advisory committees is to provide independent advice and recommendations to the Executive Branch of government."[1233] Accordingly, the FACA – the GSA continued – "is neither a public participation statute nor a collaborative process between the government, a Federal advisory committee, and the public."[1234] In 2000, the GSA issued proposed rules on the FACA, which were subject to public comments. The final rules were published on July 19, 2001,[1235] and are still effective. In the CFR, those rules are found in part 102-3 ("Federal Advisory Committee Management") of title 41, as a result of the cross-reference made to this part by part 101-6[1236]. What is relevant the most to my work is subpart D ("Advisory Committee Meeting and Recordkeeping Procedures"). Section 102-3.150 requires that advisory committees publish in the Federal Register at least fifteen days before a meeting takes place a notice containing detailed information about the meeting. The notice, in particular, has to communicate not only the time, date, place, and purpose of the meeting, but also the agenda or simply the topics that will be addressed at the meeting[1237]. The notice must also specify whether the meeting will be – in whole or in part – open to the public, and if it will not be, reasons for excluding the public from the meeting must be set forth by mentioning one or more of the exemptions established in the GITSA "as the basis for closure."[1238] An advisory committee is allowed to give a shorter notice of a meeting by publishing it in the Federal

[1232] 42 Fed. Reg. 61445 (1977).

[1233] GSA Committee Management Secretariat, to Administrative Conference (March 1, 2011) (quoted in JAMES T. O'REILLY, *Federal Advisory Committee Act: Inhibiting Effects Upon the Utilization of New Media in Collaborative Governance & Agency Policy Formation*, Draft Report to the Administrative Conference of the United States (April 15, 2011), p. 5).

[1234] Ibid.

[1235] 66 Fed. Reg. 37727 (July 19, 2001); 41 CFR part 101-6.1001 – Cross reference to the Federal Management Regulation (FMR) (41 CFR ch. 102, parts 102-1 through 102-220).

[1236] See previous note.

[1237] 41 CFR §102-3.150 (a)(2),(3).

[1238] Section 102-3.150 (a)(4).

Register less than fifteen days before the meeting is held only if "exceptional circumstances" come about, and provided that reasons for the reduced notice are set out in the notice itself[1239].

Sections 102-3.155 and 102-3.170 deal with – respectively – the closure of a meeting to the public and access to advisory committee records. Section 102-3.155 establishes a specific proceeding for the closure – in whole or in part – of a meeting. First of all, the Designated Federal Officer (DFO) has to submit a request to the head of the agency or to the Secretariat in the case of an independent presidential advisory committee, citing one or more exemptions of the GITSA that justify a secret meeting in that specific case. The head of the agency or the Secretariat is granted a sufficient period of time – usually, thirty calendar days – to make a determination on the legitimacy of the request. The General Counsel of the agency or the General Counsel of the GSA in the case of an independent presidential advisory committee is supposed to review all requests for a closed-door meeting. If the head of the agency or the Secretariat determines that the request is legitimate, the competent agency official has to issue a determination establishing that the meeting is not to be open to the public in whole or in part. Subsection (d) recognizes anyone's right to gain access to a copy of such a determination. Section 102-3.170, instead, addresses access to advisory committee records, and underlines the importance that the public be put into condition to gain "[t]imely access" to such records. It is made reference to section 10(b) of the FACA, and recalled that under that section, federal advisory committees have to ensure "the contemporaneous availability" of their own records to anyone who requires access to them. In this context, the adjective "contemporaneous" means that a person making a request for a record that pertains to a given advisory committee meeting is entitled to gain access to such a record as soon as the record itself is formed. Section 102-3.170 states that the requirement of timely access to advisory committee records, "when taken in conjunction with the ability to attend committee meetings, provide *a meaningful opportunity to comprehend fully* the work undertaken by the advisory committee."[1240] In light of what I explained above about the concept of transparency, it is evident that this clause of section 102-3.170 acknowledges such a concept, which requires agencies to make records and information not only merely available to anyone – especially by publishing them online or in the Federal Register and by releasing records whenever no essential interest calls for the invocation of an exemption –

[1239] Section 102-3.150 (b).

[1240] (Italics added).

but also understandable. Moreover, this section expressly allows advisory committees to withhold from access records concerning their meetings by applying one or more FOIA exemptions. It is specified, however, that in the event of a "*reasonable expectation*"[1241] that the sought records fall within the scope of a FOIA exemption, "agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records […]." Even though such language is somewhat obscure, it appears to exonerate persons interested in gaining access to records that are likely to be included in the scope of a FOIA exemption from the burden of pinpointing in detail the requested material, so that disclosure may be in conformity with the reasonably segregable obligation.

B. The Government in the Sunshine Act (GITSA)

1. The Essential Content of the GITSA

The GITSA requires that the public be permitted to attend any portion of any meeting held by multi-member agencies. The meaning of "agency" under the GITSA ensues from a combination of two elements. Firstly, section 552b(a)(1) contains a cross-reference to the definition of "agency" provided for in section 552(f), and therefore incorporates a definition that dates back to the APA, but also encompasses the subjects added by the FOIA[1242]. In other words, if only this element were to pinpoint the term "agency" pursuant to the GITSA, the same entities that are subject to the FOIA would also be supposed to comply with the open meeting requirements established by the GITSA. Another element of the definition of "agency," however, is peculiar to the GITSA: the multi-member composition of the directing body of the agency. Section 552b(a)(1), indeed, provides that the GITSA applies to any agency "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate […]." The GITSA also applies to "any subdivision" of multi-member agencies

[1241] (Italics in original).

[1242] See *Falwell v. Executive Office of the President*, 113 F.Supp. 2d 967, 969 (W.D. VA. 2000) (referring to *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985)). In *Rushforth*, the Court of Appeals for the District of Columbia determined that the GITSA did not apply to the Council of Economic Advisers (CEA), an agency within the Executive Office of the President, by depending on a correspondence between the entities subject to the FOIA and those subject to the GITSA. *Rushforth*, 762 F.2d, at 1043 ("Inasmuch as the Council of Economic Advisers is not an agency for FOIA purposes, it follows of necessity that the CEA is, under the terms of the Sunshine Act, not subject to that Act either.")

that conducts business on behalf of them. Under section 552b(b), agencies subject to the GITSA have to ensure that "every portion of every meeting [they hold] be open to public observation." In an early comment on the GITSA, Bullock observes that the explicit reference to "public observation" suggests that the GITSA limits itself to granting anyone a mere right to attend agency meetings, while it fails to provide "[specific] opportunities for public participation."[1243] In other words, the open meeting requirements established by the GITSA do not ensure a truly effective participation in the agency decision-making process by interested persons, who are recognized the status of pure spectators. That the public being allowed to attend multi-member agency meetings is tantamount – substantially – to a mute audience finds confirmation in section 552b(k). This section makes it clear that the public attending an agency meeting is entitled to nothing more or nothing less than what is granted by the FOIA, i.e., the right of access to the records concerning such a meeting. In particular, subsection (f)(2) requires that each agency subject to the GITSA make "promptly" available to the public the transcript, electronic recording, or minutes of any portion of a meeting.

2. The Tricky Definition of "Meeting"

It is essential to pinpoint an agency meeting under the GITSA, i.e., to determine when there is a meeting that triggers the application of GITSA open meeting requirements. Section 552b(a)(2) defines the term "meeting" by referring both to the number of agency members involved and to the activity carried out in the meeting. As to the former, there is a meeting when "at least the number of individual agency members required to take action on behalf of the agency" gathers to make deliberations. Section 552b(a)(3) specifies that pursuant to the GITSA, agency members are the individuals who belong to the collegial body that directs a given agency, and thus to the body that constitutes the head of the agency. As to the latter, the deliberations agency members gather to make must "determine or result in the joint conduct or disposition of official agency business […]." Most of the components of such a definition of "meeting," however, are only identified in a generic manner by the GITSA, and thus their application calls for a thorough interpretation. Bull has argued that "[l]ikely no interpretive issue related to the Sunshine Act has proven more contentious than [the definition of meeting]."[1244] The GITSA, for instance, does not establish a specific, pre-fixed

[1243] J.F. BULLOCK, *The Government in the Sunshine Act – An Overview*, 1977 Duke L. J. 565, 567 note 10 (1977).

[1244] BULL, *The Government in the Sunshine Act in the 21st Century*, supra note 1225, at 6.

quorum of agency members that, when it is reached, entails the application of GITSA open meeting requirements. As Senate report No. 354 of 1975 – a report accompanying S. 5, the bill introducing the GITSA – underlined, the quorum relevant to the GITSA may vary depending on the context and the agency involved. The required quorum – the report notes – usually consists in a simple majority, but in some cases – for instance, when a hearing is held or when individual members of a given agency gather to act on behalf of the agency itself – the quorum "may be less than a majority of the agency, and as few as two agency members."[1245]

3. The Ten Exemptions to the GITSA

Subsection (c) enumerates ten exemptions agencies may invoke to close an entire meeting or any portion of a meeting to the public. Those exemptions are patently modeled upon the exemptions to mandatory disclosure provided for in the FOIA, even though the former are more numerous. As with the FOIA exemptions, Senate report No. 354 prescribes that the exemptions to the GITSA "[may] not be used to circumvent the spirit of openness which underlies this legislation."[1246] In particular, exemptions 1, 2, 3, 4, 6, 7, and 8 correspond to the same exemptions to the FOIA, and even the language whereby the exemptions are formulated is almost entirely identical. Instead, there is no trace of the need to protect from access both geological and geophysical information, as well as maps of wells, and thus the reasons for secrecy Exemption 9 of the FOIA incorporates may not be invoked to close up a meeting under the GITSA.

Furthermore, Exemption 5 of the GITSA differs completely from the corresponding number of exemption in the FOIA. Instead of referring to the deliberative process privilege and to the presidential communications privilege – application of the letter is hard to conceive of with respect to the GITSA – as well as to the attorney-client privilege, Exemption 5 of the GITSA is concerned with the accusation of any person – an individual or a corporation – of a crime or with formal censure directed at any person. As the Senate report clarifies, censure as meant pursuant to the GITSA "includes formal reprimands."[1247] Permitting the public to attend an agency meeting aimed at discussing a person's alleged

[1245] S. Rep. No. 94-354, 94th Cong., p. 19, reprinted in *Government in the sunshine act, S. 5 (Public Law 94-409: source book, legislative history, texts, and other documents* (Washington, D.C., Gov't. Prin. Off., 1977) [hereinafter – *1977 GITSA Source Book*], p. 214.
[1246] Id., at 20, reprinted in *1977 GITSA Source Book*, at 215.
[1247] Id., at 22, reprinted in *1977 GITSA Source Book*, at 217.

crimes and the possibility of turning to the Department of Justice to solicit prosecution or aimed at considering the filing of formal censure against a person – the report observes – "could irreparably harm the person's reputation."[1248] At close of discussion in the meeting, indeed, the agency may well decide not to accuse the person under examination of a crime or to not file formal censure. Yet, the mere discussion of the conduct of the person involved would cause harm to the person's reputation if the meeting devoted to discussion of his or her position were open to anyone, thereby rendering such a conduct of public domain. Since the production of such harm would be "very unfair," and thus is to avoid, the report continues, the agency "has the latitude to close the meeting," whether or not investigatory records concerning the involved person are considered during the discussion[1249]. The report, however, also specifies that Exemption 5 may not be subject to such an extensive interpretation as to allow agencies to exclude the public from "every meeting placing a company in a bad light."[1250]

A ground for keeping a meeting or a portion of a meeting secret that appears to recall the deliberative process privilege provided for in Exemption 5 of the FOIA is found in Exemption 9 of the GITSA. Subparagraph (A) of paragraph (9) allows an agency that regulates currencies, securities, commodities, or financial institutions to close a meeting to the public when the "premature disclosure" of the records and information relevant to the meeting could either foster financial speculation in the respective market or "significantly endanger the stability of any financial institution."[1251] This aspect of the exemption – perhaps it may be better to call it a subexemption – is related to Exemption 8, which – similarly to the corresponding exemption of the FOIA – allows holding a closed-door meeting when the subject of the meeting involves material produced or used by "an agency responsible for the regulation or supervision of financial institutions." Reference to the deliberative process privilege, instead, may be inferred from subparagraph (B) of paragraph (9), which empowers each agency subject to the GITSA to close a meeting concerning information, the disclosure of which "[would] be likely to significantly frustrate implementation of a proposed agency action […]." Senate Report No. 354, actually, suggests that the whole Exemption 9 is based on a rationale that is very close to that of Exemption 5 of the FOIA. The report, indeed, points out that paragraph (9) "applies in certain specific instances where premature

[1248] Ibid.

[1249] Ibid.

[1250] Ibid.

[1251] 5 U.S.C. 552b(c)(9)(sentence following subparagraph (b)).

disclosure of information would destroy an agency's ability to perform its functions effectively."[1252] The need to protect a meeting from public observation, however, is more evident – and thus more compelling – in the situations contemplated in subparagraph (b), wherein the confidentiality of discussion between agency members during a meeting avoids the risk that the implementation of the agency's plans be seriously undermined by the disclosure of information and records under consideration in the meeting. Similarly to Exemption 5 of the FOIA, whose purpose is to ensure that agency employees candidly exchange their ideas and opinions concerning legal and policy issues, the exemption provided for in paragraph (9)(b) is aimed at ensuring frank discussion in a meeting. The Senate report formulates an example, wherein a meeting is devoted to discussion of the strategy a given agency should follow in stipulating new contractual conditions for its employees. The contextual disclosure of possible options thereupon, caused by the openness of the meeting to the public – the report argues – "might make it impossible to reach an agreement [between the members of the heading body of the agency]."[1253] Agencies, however, may not invoke paragraph (9)(b) to close a meeting whenever they have already disclosed to the public, whether voluntarily or by law, "the content or nature of its proposed action […]."[1254] Since this exemption applies when an agency deems it necessary to resort to secrecy – the Senate report observes – "it would be contrary to the intent of this provision for an agency to rely on it when the public is already aware of the actions being considered, or where the Administrative Procedure Act or other statute requires the agency to publicly announce its proposal before taking final action."[1255]

Finally, Exemption 10 of the GITSA allows an agency to exclude the public from a meeting aimed at discussing the issuance of a subpoena, the agency's participation in civil proceedings, or the filing of an action with a foreign court or an international tribunal. The scope of this exemption also includes meetings wherein an agency considers the initiation, conduct, or disposition of formal agency adjudication pursuant to section 554 of title 5, U.S. Code. Overall, this exemption is aimed at enabling an agency to discuss frankly what legal strategy to adopt in a case before the agency itself or in the courts[1256]. Allowing the public to attend a meeting devoted to the discussion of such aspects could affect the merits of the

[1252] S. Rep. No. 354, at 24, reprinted in *1977 GITSA Source Book*, at 219.
[1253] Ibid.
[1254] 5 U.S.C. 552b(c)(9)(B)(ii).
[1255] S. Rep. No. 354, at 25, reprinted in *1977 GITSA Source Book*, at 220.
[1256] Id., at 26, reprinted in *1977 GITSA Source Book*, at 221.

litigation[1257]. As far as formal adjudications are concerned, the Senate report specifies that a meeting may be closed to the public by applying Exemption 10 only if the meeting is aimed at discussing a particular case or a homogeneous series of cases, each of which satisfies the requirements for closure. The exemption, instead, may not apply to a meeting wherein an agency "discusses its adjudication policies in general, such as the policy that should be adopted towards all those that may violate a particular law."[1258]

4. Costs Arousing From Application of the GITSA

a. A Series of Costs

Since the enactment of the GITSA, it has been noted that the application of this act entails some operational costs, which may be explained as agencies' reaction to the GITSA transparency obligations. Such costs ensue mostly from usage of techniques whereby agencies circumvent the application of the open meeting requirements established by the GITSA. The effect such techniques produce, therefore, end up substantially equating to that of the exemptions: In either case, multi-member agencies' decision-making process is shielded from public observation. A first type of cost that has emerged in practice is the tendency of agencies to refraining from making collegial decisions. In other words, to avoid triggering the obligation to comply with the GITSA, agencies soon began delegating to individual members of their heading body the power to make determinations on behalf of the agencies themselves[1259]. Another practice aimed at circumventing the law consists in having staff members and assistants, instead of the members of the heading body of agencies, gather to discuss legal and policy issues. The meetings of staff members and assistants end

[1257] Ibid. ("Public disclosure of an agency's legal strategy in a case before the agency or in the courts could make it impossible to litigate successfully the action.")

[1258] Ibid.

[1259] See KATHY BRADLEY, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 Fed. Comm. L. J. 473, 482-483 (1997) (referring to DAVID M. WELBOM et al., *Implementation and Effects of the Federal Government in the Sunshine Act*, 236 (Washington, D.C., Administrative Conference of the United States, 1984) (noting that a study on implementation of the GITSA conducted seven years after the enactment of the act "found that there was a shift in decisionmaking away from collegial processes and toward segmented individual processes.")

up being the place wherein substantial decisions are made, whether or not there is a subsequent, formal meeting between agency members[1260].

b. Notation Voting

The most important of the techniques aimed at circumventing open meeting obligations, however, appears to be the so-called notation (or notational) voting. The purpose of notation voting is to allow agency members to have such discussions as are necessary for the carrying out and disposal of agency business in writing, i.e., through exchange of written communications,[1261] and thus without holding a formal meeting. In addition to exchange of communications, notation voting, as the name of this technique suggests, consists in voting serially and in writing on agency business[1262], and thus on what actions to take in performing agency functions. In a 1978 decision, *Communication Systems, Inc. v. Federal Communications Commission*[1263], the Court of Appeals for the District of Columbia ruled that notation voting was a practice compatible with the GITSA. The Court refers to section 552b(b), which requires that agency comply with the GITSA when they "jointly conduct or dispose of agency business […]." Such a provision is considered to be "ambiguous," as it does not clarify whether it applies only to actual meetings of agency members, characterized by "face-to-face communications," or extends to "more remote communications," which occur – for instance – when agency business is conducted "by circulating written memoranda or voting sheets."[1264] According to the Court, however, the legitimacy of notation voting can

[1260] The 1984 study on implementation of the GITSA mentioned previously noted that meetings of staff members "were much more likely to take place before the scheduled open meetings." BRADLEY, *Do You Feel the Sunshine?*, id., at 483 note 59 (referring to WELBOM et al., id., at 223).

[1261] See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *Recommendation 2014-2, Government in the Sunshine Act* (June 5, 2014), p. 2 (defining notational voting as a proceeding by which agency members "communicate with one another and reach a decision via the exchange of written documents.")

[1262] See U.S. GENERAL ACCOUNTING OFFICE, *64 Decisions of the Comptroller General of the United States – October 1, 1984 to September 30, 1985*, 737 (Washington, D.C., Gov't Print. Off., 1986) (referring to Senate Rep. No. 98-561, 98th Cong., 2nd Sess., 78-79 (1984)) (wherein the Senate Appropriations Committee expressed concern about the fact that the then-existing Interstate Commerce Commission (ICC) had held no open meetings whatsoever since October 1982, even though it had taken almost 3,000 votes on diverse matters)). Such a practice prompted the Committee to question the ICC's compliance "with the spirit and intent of the [GITSA]." Id., at 736 (referring to Senate Rep. No. 561, ibid.).

[1263] 595 F.2d 797 (D.C. Cir. 1978).

[1264] Id., at 799.

be inferred from the legislative history of the GITSA. The Court, in particular, relies upon a congressional report, the Conference Committee Report on the GITSA[1265], which determined that section 552b(b) may not be interpreted so as to "prevent agency members from considering individually business that is circulated to them sequentially in writing."[1266] The Court of Appeals for the District of Columbia recognizes the legitimacy of notation voting by using very practical arguments. Agencies may deploy notation voting – the Court observes – "to expedite consideration of less controversial cases without formal meetings […]." If the holding of a formal meeting were to be necessary for the conduct of any agency action, "the entire administrative process would be slowed – perhaps to a standstill." Therefore, a formal meeting – the Court continues – may be just devoted to discussion of "serious issues that require joint face-to-face deliberation."[1267]

[1265] S. Rep. No. 94-1178, 94th Cong., 2nd Sess. (August 27, 1976), reprinted in *1977 GITSA Source Book*, at 783.

[1266] S. Rep. No. 1178, at 11, reprinted in *1977 GITSA Source Book*, at 793. In like manner, during floor debate on the GITSA, Rep. Flowers maintained that section 552b(b) "would not preclude agencies from disposing of noncontroversial matters by written circulations." 122 Cong. Rec. 24184 (July 28, 1976).

[1267] *Communication Systems*, 595 F.2d, supra note 1263, at 800-801.

CONCLUSIONS

The U.S. model of transparency at federal level proves satisfactory. I have used the very term "model" throughout the work to stress that the United States experience is usually taken into consideration as a sort of archetype of how the need for public scrutiny and the interest of the executive branch in keeping a certain level of secrecy may be held together in a successful fashion. The U.S. model, indeed, possesses all such elements as Mendel has identified for the existence of comprehensive FOI legislation. Here, the adjective "comprehensive" is used to mean that FOI legislation may be properly considered as such only if domestic statutes of the country at issue go beyond the mere regulation of the right of access to documents, data, and information held by public authorities. Mendel, in particular, has pinpointed a series of criteria with which every FOI legislation ought to comply. The criteria are the following: maximum disclosure of – at least – administrative records; obligations to publish information imposed on administrations and other public entities; promotion of open government; the limited scope of exemptions to FOI legislation, and thus to mandatory disclosure; processes to facilitate access to public authorities' records; (reasonable) costs for access; the provision for open meetings, i.e. meetings of administrations the general public is allowed to attend, whether or not the public is also recognized an active role; prevalence of openness over secrecy; protection for whistleblowers[1268]. The analysis conducted in this work has shown that the U.S. legal system considers – and applies – all these criteria in shaping its own system of transparency in the public sector.

Nevertheless, the U.S. model of transparency does not turn out to be flawless. The analysis has also led to detect some paradoxes, the assessment of which is mixed. Some of those paradoxes, indeed, may be considered to contribute to the success of the system, while some others certainly do not. A first paradox, which is ascribable to the first group, i.e., among the paradoxes producing positive outcomes, stems from considering the U.S. system

[1268] More precisely, Mendel pinpoints the components of a comprehensive FOI regime by employing the following formulas: "maximum disclosure;" "obligation to publish;" "promotion of open government;" "limited scope of exceptions;" "processes to facilitate access;" "costs;" "open meetings;" "disclosure takes precedence;" "protection for whistleblowers." THOMAS MENDEL, *Freedom of Information: A Comparative Legal Survey*, 29-41 (UNESCO, 2008).

as a whole. Even though scholars tend not to dwell too much on the concept of transparency – or, at least, not as much as scholarship does in Europe – the model of transparency the United States possesses is advanced. The U.S. experience, indeed, has traditionally identified with such terms as "sunlight" and "sunshine" what has been long referred to as the scope of transparency in European countries. Therefore, a conclusion that may be reached in this regard is that one of the features that appear to make the U.S. experience so unique actually boils down to a matter of different terms used in the United States and overseas to describe the same phenomenon – transparency in the public sector.

The concept of secrecy, too, has had autonomous development in the United States. It is not a coincidence that the study of the more specific concept of "government secrecy," meant essentially as executive branch secrecy, gained momentum in the early 1970s. That was a time in which President Nixon's attempt to cover up the Watergate scandal – namely, to prevent the disclosure of White House conversations related to the affair – and the need to engage in early assessment of the implementation of the FOIA, become effective on July 4, 1967, prompted the members of Congress and scholars to pierce into such a concept. The very Watergate scandal and its judicial aftermath constituted at the time – and actually still does – manifest evidence of the veracity of what Sen. Edward M. Kennedy stated at the 1973 Senate subcommittee hearing mentioned in Chapter 1: Secrecy tends to foster the commission of wrongdoing. At the same hearing, however, Attorney General Richardson identified a paradox that features the relation between transparency and secrecy and thus can be added to the series of paradoxes I have detected. The Attorney General, indeed, observed that despite the risk of its misuse, government secrecy is inevitable, as it serves the purpose to protect some vital interests to the country. The Attorney General also underlined that the President of the United States has authority to maintain a certain level of secrecy, and this authority derives both from his role as Commander-in-Chief of the armed forces and from his power in the domain of foreign affairs. What are the interests, the protection of which is ensured by government secrecy? An answer may be to refer to the interests the exemptions established by the FOIA underlie. However, it is more proper to recall the address that another Attorney General – Edward Levi – delivered before the Association of the Bar of the City of New York in 1975. I agree with Chesney, indeed, that Levi's address grasps the essence of the relation between transparency and secrecy. In particular, Levi deserves credit for identifying clearly some of the basic interests a legal system may not fail to preserve by resort to secrecy: national security; foreign affairs; law enforcement. In addition to the need for secrecy that agencies must depend on in the course of their decision-making process,

indeed, these interests embody typical matters wherein the executive branch of the Federal Government hold records and information, the disclosure of which could undermine the protection of the underlying interests. To put it differently, while the FOIA exemptions also include interests that are aimed at preserving above all the position of individuals that get in touch with federal agencies, such as privacy and interests related to trade secrets, Levi's address identifies a pregnant meaning of government secrecy. The Moynihan Commission Report, however, has further restricted the concept of government secrecy by identifying it with the system of classification of national security information. Indeed, the classification system, the scope of which is concerned with not only the domain of national security but also that of foreign affairs, constitutes the core of government secrecy, and – as I have sought to show – has implications for all three branches of the Federal Government. The national security domain, furthermore, is fertile soil for the resort to deep secrets by the executive branch. The distinction between deep and shallow secrets follows a purely theoretical approach to secrecy, and was not even devised with respect to the public sector. It is noteworthy, however, especially if this distinction is appealed to in order to express a sort of warning against the usage of deep secrets. Kitrosser has argued that only shallow secrets are compatible with the U.S. Constitution, for they may be checked within the three branches of the U.S. Government. By exercising its power of inquiry into the executive branch and its conduct, however, Congress is capable of bringing deep secrets to light. More generally, Congress's oversight function results in reducing the amount of executive branch secrecy. Nevertheless, I have dwelled on Nixon's incoherence to warn against overestimation of the congressional oversight function, or – at least – to point out the risk that this function be exploited by one or more members of Congress to gain importance on the political scene, as indeed was the case with Nixon. Despite belonging to an era completely different from the current one, the Hiss-Chambers case is of interest for two reasons. First of all, then-Representative Nixon could rely on a good deal of investigation files and information handed to him by FBI agents. This fact shows, as the recent affair concerning the "Operation Fast and Furious" – mentioned later in the work – also does, that the exercise of the congressional oversight function requires cooperation by executive branch personnel. Furthermore – and above all – Nixon's behavior in the Hiss Chambers case, seemingly moved by the objective to give the value of transparency the maximum implementation, contrasts with the claim of absolute secrecy he tried to raise with respect to the Watergate scandal. The full access doctrine, however, puts emphasis on the importance of the congressional oversight function. I have argued that this doctrine, actually, does not bring any novel contribution to the debate

over the amount of executive branch information, the access to which is to be ensured to Congress, except for one aspect. This theory, indeed, underlines that Congress needs to gain broad access to information even in matters that traditionally feature a high level of secrecy such as the gathering of foreign intelligence and the conduction of covert action.

Since the system of classified information pertains to the fields of national security and foreign affairs, and constitutes the core of government secrecy, I have seen it fit to look through the concept of national security. This concept, however, has flexible content, which tends to adjusts over time to the mutable set of threats to the country that the Federal Executive identifies in its strategic documents. Therefore, it is impossible to provide a single, stable definition of national security. Scholars have long agreed, however, that the scope of national security is much broader than the military domain. Whether or not the military domain is involved, a good deal of national security information is subject to classification. The unauthorized disclosure of classified information may occur as a result of leaks and whistleblowing, activities whereby employees or other persons somehow related to the executive branch make available to people information that was supposed to remain secret. Despite stirring up debate in the public opinion, however, the dissemination of classified information usually does not bring about any immediate effects in the national security domain both at statutory and at administrative level. WikiLeaks disclosures of a huge amount of classified information pertaining to national security, foreign affairs, as well as purely military operations of the United States, for instance, have shown that there may well not be any direct reaction by the U.S. Government to the unauthorized disclosure of information. The affair concerning WikiLeaks disclosures is interesting above all for pointing out the need to change the approach towards leaks. WikiLeaks, indeed, is not a traditional newspaper capable of acting as an intermediary that sifts the information received before publishing it.

As the case with national security, the concept of homeland security does not have a single definition. This concept gained momentum in the aftermath of the attacks of September 11, 2001, when it was addressed both at statutory and administrative level. The Homeland Security Act of 2002 established the Department of Homeland Security, which represents an extraordinary reorganization of the administrative structure of the Federal Executive, as it absorbed twenty-two federal agencies, each of them having their own missions previously. The same act also added a new exemption to the mandatory disclosure imposed upon agencies under the FOIA by incorporating a non-disclosure provision concerning the critical infrastructure information handled by the Department of Homeland

Security into the scope of Exemption 3 of the FOIA. The concept of homeland security has gone through a gradual development since its stable adoption in the early years of the twenty-first century. When the new department was established, homeland security was essentially aimed at coping with the terrorism threat. The scope of the concept, however, gradually extended to several other matters, such as natural disasters and accidents caused by human activities that occur on U.S soil, border and maritime security.

I have tried to advance a possible distinction between the concepts of national security and homeland security. Such a distinction indicates the latter includes all threats and events that exhaust their effects on U.S. soil, and thus within a merely domestic context. National security, instead, extends to the threats posed to the country that are concerned with an international context, and thus involve operations conducted by intelligence agencies abroad. This possible distinction takes up some considerations raised at a 2012 House of Representatives subcommittee hearing, and is in accordance with a position expressed by Morag. At that hearing, furthermore, it was observed that the large number of strategy documents that the White House and the Department of Homeland Security issue on a regular basis end up – or, at least, may end up – hampering the accomplishment of the multiple homeland security missions those documents pinpoint. One may wonder what the point is in analyzing the concepts of national security and homeland security, and in seeking to trace a line of demarcation between their scopes. The fact that both concepts do not have pre-fixed, stable content results in assigning great discretion to the federal departments and agencies that classify information – especially, to the original classification authorities – in pinpointing material to subject to classification. Another paradox ensues in this regard. The Department of Homeland Security was created to ensure better coordination within the Federal Executive for the management of homeland security and thus to achieve an increase in the rationalization of the system. The concept of homeland security, however, has made the content of national security blurrier. This assumption is shown, for instance, by the fact that a component of homeland security is homeland defense, which derives from the traditional concept of civil defense. Accordingly, homeland defense implies the organization of a reaction against any attack or event causing damage to the United States, and thus appears to have connections with the concept of national security. Furthermore, it must be taken into consideration that the Secretary of Homeland Security and some authorities within the Department of Homeland Security are empowered to classify information originally. The types of information that may be classified under the executive order on classification refer to the fields of national defense and foreign relations, but the obscure distinction between

national security and homeland security may result in making obscure the identification of the material to classify, as well. Therefore, original classification authorities appear to have great discretion – maybe even greater than the one they had in the past – in selecting the information to classify.

Chapter 2 has been devoted to the relation between transparency and secrecy in the legislative and in the judicial branch of the Federal Government. The present chapter has been aimed at providing a more complete picture of the compromise between transparency – meant in this chapter as not merely related to access to information – and secrecy by showing that the way in which this compromise is reached in the other two branches has unexpected connections with executive branch secrecy. As far as Congress is concerned, first of all, a further paradox is concerned with usage of the term "secrecy" in the U.S. Constitution. Even though government secrecy is usually referred to the executive branch, the Constitution mentions this term in the article devoted to the legislative branch, Article I, and especially in Section 5, Clause 3, which allows the two Houses of Congress to resort to secrecy in the journal reporting on their proceedings. The Congressional Record, which has been Congress's official gazette since its creation, represents a form of transparency that is typical of the legislative branch, and that does not leave much room for secrecy. After all, Congress's primary function, the law-making function, requires a high level of transparency, and indeed Kitrosser has observed that legislative proceedings are featured by "macro-transparency."[1269] The specific rules governing the activities of the two Houses of Congress and of congressional committees, however, take into consideration the need for secrecy, and this very topic reveals some connections with the regulation of executive branch secrecy. Even though those connections are purely theoretical, they are interesting insofar as they point out the existence of common principles concerning limits to transparency. Firstly, history shows that secret sessions of the two Houses of Congress – especially those of the Senate, which has met in secret much more frequently than the House of Representatives – are held to discuss matters pertaining to national security and foreign affairs. Such sessions, therefore, appear to constitute a further application of the concept of government secrecy, provided that government is meant as including not only the Executive but the three branches. Secondly, the grounds for secrecy the members of Congress may invoke especially

[1269] For an analysis of legislative proceedings in the United States from a foreign scholar's perspective, see FULCO LANCHESTER, *"Drafting" e procedimento legislativo in Gran Bretagna e negli Stati Uniti d'America* (Roma, Bulzoni, 1990).

for the closure of committee and subcommittee meetings and hearings recall the exemptions of the FOIA. Meaningful thereof is Rule XXVI(5)(b) of the Standing Rules of the Senate, which by establishing the reasons that may justify the exclusion of the public from a committee or subcommittee meeting recalls several FOIA exemptions quite clearly. Indeed, among the matters, the discussion of which may justify secrecy, are national security and foreign affairs, matters pertaining to committee staff personnel or purely internal procedures, the need to protect an individual's privacy, information relevant to law enforcement investigations, financial or commercial information and trade secrets. Secrecy in judicial proceedings, too, is related – at least indirectly – to executive branch secrecy. The state secrets privilege and the Classified Information Procedure Act are the instruments allowing for a balance between transparency and secrecy – respectively – in civil litigation and in criminal proceedings. Therefore, these instruments – the former a common law evidentiary privilege, the latter a federal statute – point out in civil and criminal litigation such need to reach a compromise between transparency and secrecy as the FOIA ensures whenever the disclosure of agency records and information is involved. Since the state secrets privilege may be invoked by the U.S. Government in the interest of national security, and the CIPA is aimed at governing the usage of classified information in criminal proceedings, Exemption 1, the national security exemption, represents the main reference within the FOIA.

As I already noted in the Introduction, Chapter 3 is the core of the present work, as it addresses the relation between transparency and secrecy in the executive branch. I have deliberately analyzed executive privilege and the FOIA in the same chapter to point out that there are connections between them, as well. Furthermore, by analyzing them I have pinpointed another paradox. While executive privilege is just at times invoked by U.S. presidents – here, I have adopted the common acceptation of executive privilege as the ability of the President to withhold information from Congress – it is usually analyzed by following a somewhat theoretical approach. Scholars, instead, appear to follow a less theoretical approach when they deal with the FOIA, the interpretation of which is mostly left to courts, and the other sunshine laws at federal level – the FACA and the GITSA. If this approach may be understandable for the FACA and the GITSA, which appear to be ancillary in the overall system of transparency, it is more surprising with respect to the FOIA. Even though many articles and books have addressed the FOIA over time, court decisions and congressional reports – rather than scholars' views – appear to be the main sources to draw upon for discussion over FOIA provisions. A typical example of the theoretical approach that tends to feature the way executive privilege is addressed is Berger's attempt to deprive

executive privilege of any constitutional foundations by deploying both legal arguments and historical precedents that mostly pertain to the British experience. The primary purpose of Berger is to prove that Congress's power of inquiry into the executive branch is at the heart of the constitutional architecture devised by the Framers. The consequence of such an assumption is that Congress may be never denied access to the information it needs when it is conducting investigations over the executive branch. As I noted above, it is undeniable that Congress's oversight function contributes significantly to increase transparency in the executive branch. However, it is not a coincidence that Berger depends on the British experience – namely, on investigations carried out by the British Parliament in the seventeenth and eighteenth centuries – to pinpoint historical precedents capable of supporting his theory. As some scholars objecting to his theory have stressed, indeed, the presidents have withheld information from Congress since the George Washington administration. Therefore, history already proved what the Supreme Court explicitly conceded in Nixon: Executive Privilege is an implicit power of the President, which enjoys constitutional underpinnings. Berger's laudable endeavor to base on both history and law the executive branch obligation to comply with any request for information made by Congress with no exception whatsoever is not tenable. In Nixon, however, the Supreme Court also contended that executive privilege is not absolute, as instead President Nixon claimed. Nixon's attempt to justify an excessive level of secrecy through executive privilege had direct implications for the subsequent usage of the privilege. For at least twenty years, indeed, the U.S. presidents seldom invoked executive privilege. The privilege has revived since the Clinton administration. I have mentioned the recent invocation of executive privilege by President Obama to deny access to certain documents to a House committee inquiring into the "Operation Fast and Furious." In this case, the President claimed the application of executive privilege to protect not national security, but the confidentiality of executive branch communications that were not directly related to the presidential decision-making process, as they occurred within the Department of Justice.

Part II of Chapter 3 has been devoted to the FOIA. Overall, the experience with the FOIA proves successful. When it became effective in 1967, the FOIA brought a significant improvement in the level of openness that federal agencies had to ensure. Even though the policy of full disclosure the FOIA is based upon was realized especially after the enactment of the 1974 FOIA Amendments Act, it was quite clear from the outset the enactment of the act resulted in overcoming section 3 APA, whose broad, generic clauses had been used by agencies to apply a high level of secrecy. In other words, the previsions in favor of disclosure

that section 3 APA contained were circumvented on a regular basis. In addition to those brought in by the 1974 statute, the FOIA has been subject to some other major amendments over the years. The Electronic Freedom of Information Act of 1996 and the OPEN Government Act of 2007 constituted the two most important steps in the evolution of FOIA provisions. The latter mostly dealt with FOIA procedural requirements. The former, instead, above all provided for the online availability of agency records and information, addressed proactive disclosures, and established a definition of "agency record." By inserting into the system of proactive disclosure the category of "frequently requested records," the Electronic Freedom of Information Act of 1996 brought a significant improvement to this system. Agencies, indeed, are required to make available to the general public records that have already been released in response to individual FOIA requests and that have become the subject of multiple requests or, according to an agency determination, will probably become the subject of multiple FOIA requests. The purpose of the amendment that inserted this new proactive disclosure obligation was to increase the efficiency of the processing of FOIA requests, since records that are frequently requested or it is likely that they will be frequently requested in the future are already made available by the agency without waiting for further requests. Proactive disclosure is one of the two components of openness, and – in turn – may consist in two different activities: the publication of information in the Federal Register, the official gazette of the executive branch, and the publication of records and information on agency official websites. The release of the frequently requested records falls within the latter activity. Both activities, however, must be considered as included in the system of proactive disclosure, even though the official guide to the FOIA, prepared – and updated on a regular basis – by the Department of Justice, seems to suggest otherwise. The other component of openness is the release of records and information in response to a FOIA request. Agencies have to comply with FOIA requests filed by any person without considering the reasons that move a given person to file a request for information, unless the agency processing the request determines that one or more FOIA exemptions apply. The general purpose of the FOIA, however, is to ensure the disclosure, not the withholding, of information. Therefore, agencies are required to separate – whenever possible – the portion of a given record that is not covered by any exemptions from the portion, the access to which may lawfully be denied to protect one or more of the essential interests that the FOIA exemptions imply. Furthermore, agencies are supposed to apply the FOIA exemptions by subjecting them to a narrow interpretation. The exemptions embody a compromise Congress established between openness and secrecy, but it is for agencies to give substance to such a

compromise in practice. Agencies have to follow the instructions contained in the memoranda each President and each Attorney General issue on implementation of the FOIA by the executive branch as a whole. In accordance with the promise to establish a level of openness in the Federal Executive that had never been experienced before, both the memorandum issued by President Obama and the one issued by Attorney General Holder on the FOIA directed agencies to apply a presumption in favor of disclosure in implementing FOIA provisions. Yet, it has not been always like that. The memorandum issued by Attorney General Ashcroft in 2001, in particular, instructed agencies to consider thoroughly the existence of the need to apply one or more FOIA exemptions before opting for disclosure, and laid down a sound legal basis standard for the intervention of the Department of Justice in defense of agency withholding determinations. With a stroke of the pen, the Ashcroft memorandum degraded the right to know ensured by the FOIA to a weaker need to know. As has been noted, the Holder memorandum re-established the level of transparency the Federal Executive experienced under the Clinton administration.

I have also engaged in a closer examination of two FOIA exemptions, which arouse interest within the framework of the present work. Exemption 5 textually refers to the so-called deliberative process privilege, a privilege that allows agencies to withhold from access such memoranda and other documents as are exchanged within an agency and between agencies in the formation of policies. This privilege, therefore, is aimed at ensuring that the exchange of ideas and opinions among agency personnel be frank. The risk that all such ideas be subject to disclosure, and that agencies thus be forced to operate in a fishbowl, indeed, could prompt agency personnel to refrain from expressing their views freely, and the quality of agency decision-making would be undermined. The need to preserve the candor of communications is also concerned with White House conversations, i.e., conversations that occur between the President of the United States and his advisors. In such cases, a different privilege applies – the presidential communications privilege, which embodies the core of executive privilege, meant as an instrument aimed at safeguarding the confidentiality of presidential decision-making process. Courts deem it to fall within the scope of Exemption 5, even though the scope of the presidential communications privilege is not tantamount to that of the deliberative process privilege, as the Court of Appeals for the District of Columbia clarified in *In re Sealed Case*. Another exemption I have focused on is Exemption 1, which is peculiar within the system of exemptions because Congress delegates to the President the power to fill this exemption with substantial content. It is an executive order issued by the President, indeed, that lays down rules, standards, and procedures on the

classification of information pertaining to the national defense and foreign relations of the United States. Exemption 1, however, makes it clear that agency classification determinations are subject to judicial review. By significantly amending the wording of this exemption, the FOIA Amendment Act of 1974 explicitly assigned court the authority to conduct *in camera* examination of classified material, and to engage in *de novo* review of the withholding of such material from access. This theoretical regulation of the relation between the executive and the judicial branch does not suffice to grasp the dynamics that feature such a relation in practice, for it is also necessary to take into account the expertise that federal agencies possess in the domains of national security and foreign affairs. Courts tend to recognize such expertise, and accordingly deference is the traditional approach of courts towards agency determinations on classification of information. Recent data on the FOIA show that federal agencies invoke Exemption 5 much more frequently than Exemption 1, even though the gap in the usage of the two exemptions is not uniform within the executive branch. Such a gap, for instance, is higher with respect to the Department of Homeland Security than it is as to the number of invocations of exemptions 1 and 5 by the Department of Defense[1270]. The importance of exemptions 1 and 5, however, lies not in the frequency of their application but in the fact that their scope embrace most of the issues dealt with in the present dissertation.

Even though the FOIA is at the heart of the model of transparency concerning the executive branch and the whole apparatus of departments and agencies, this model also embraces the FACA and the GITSA. These statutes – but especially the latter – establish open meeting requirements agencies have to comply with when they hold meetings, and thus when they carry out their decision-making process. The people's ability to attend meetings held by agencies (and by advisory committees) contributes to making such decision-making process more visible, and thus more transparent. Granting access to agency meetings, indeed, is one of the components of a comprehensive FOI legislation Mendel has identified. The FOIA does not appear to be a subject of frequent analysis by scholars, and thereby courts – as noted above – end up mastering its interpretation. Studies on the FOIA, however, are much more numerous than those concerning the FACA and the GITSA. As Bull has pointed out, indeed, the FACA and the GITSA "have received relatively scant attention in scholarly

[1270] According to data on the FOIA pertaining to the period 2014-2015, the Department of Homeland Security applied Exemption 1 59 times and Exemption 5 46293 times, while the Department of Defense invoked the two exemptions in the same time frame – respectively – 2626 and 3331 times. See https://www.foia.gov/data.html.

writings."[1271] A possible reason for this fact is that these statutes are considered to lay down purely operational rules, which are left to practice, and thus to their practical application by agencies. Analyzing the FACA and the GITSA on a regular basis may be useful to better understanding of the overall model of transparency in the United States. Despite the few paradoxes mentioned above, the U.S. model of transparency in the public sector turns out to be complete.

[1271] BULL, *The Government in the Sunshine Act in the 21st Century*, supra note 1224, at 2.

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